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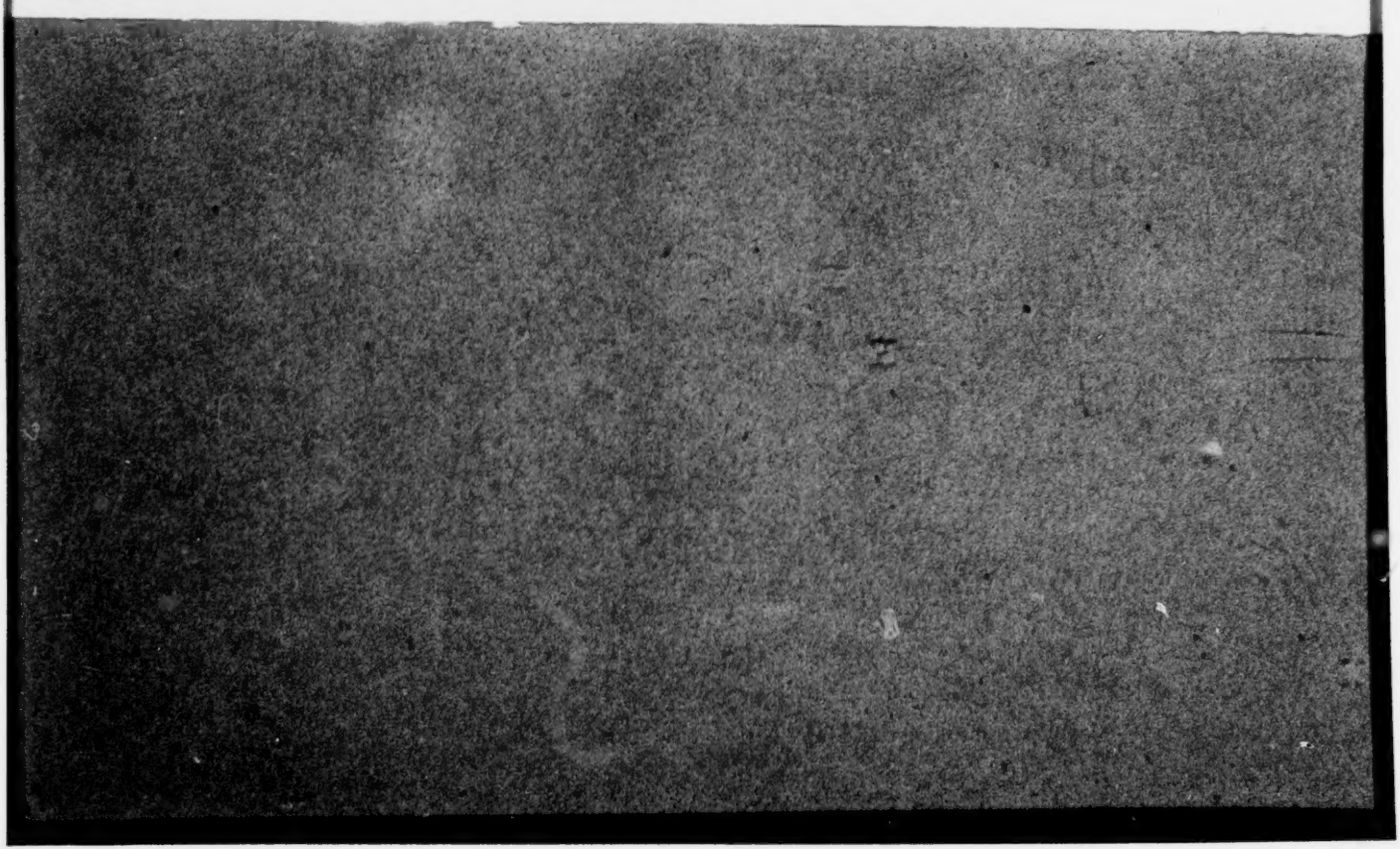

# (18,590.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1903.

No. 76.

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THE CLIPPER MINING COMPANY, PLAINTIFF IN ERROR,

*vs.*

THE ELI MINING AND LAND COMPANY, A. D. SEARL, F. C. SCHROEDER, A. F. BRITTON, AND H. J. GRAY.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

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1 In the Supreme Court of the State of Colorado.

THE CLIPPER MINING COMPANY, Plaintiff in Error,
*vs.*
THE ELI MINING & LAND COMPANY, A. D. SEARL, F. C. Schroeder, *et al.*, Defendants in Error. } No. 4115.

To the Honorable John Campbell, chief justice of the supreme court of the State of Colorado:—

Now comes the plaintiff in error above named, The Clipper Mining Company, and respectfully represents and shows that in the record and proceedings, and also in the rendition of judgment by this court in the suit of The Clipper Mining Company defendant in the district court and plaintiff in error in this court *vs.* The Eli Mining & Land Company, F. C. Schroeder, A. D. Searl and others, plaintiffs in the court below and defendants in error in this court, the same being case No. 4115 on the dockets of this court the same being the highest court of law and equity in the State of Colorado in which a decision could be had in said suit, and in which a final judgment was rendered upon the merits in said cause by affirming the judgment of the district court of Lake county, which said judgment was in favor of the plaintiff and against the defendants, and settled all matters in controversy between said parties in said cause, manifest error was committed to the detriment and wrong of the said plaintiff in error in that the said The Clipper Mining Company, the plaintiff in error in said cause claimed
2 the title, right and privilege under the Constitution and laws of the United States of America to the ownership of four certain lode mining claims known respectively as the Clipper, Castle, Congress and Capitol Lode mining claims located in the California mining district, county of Lake and State of Colorado, the title to which was claimed by said Clipper Mining Company under the laws of the United States of America and the decision of the said district court of Lake county and affirmed by the supreme court of the State of Colorado was against said title; and in the trial of said cause the district court of Lake county in passing upon said title claimed under the laws of the United States, committed a grievous error to the detriment and damage of your petitioner, the said The Clipper Mining Company, in that the said court held that the action of the Commissioner of the General Land Office and the Secretary of the Interior of the United States in determining that the title set up in opposition to that of your said petitioner was null and void and was not binding upon said court; the said court erred in refusing to admit in evidence, the proceedings of the said Secretary of the Interior and the Commissioner of the General Land Office, setting aside the title claimed in opposition to that of your petitioner, and your petitioner further avers that in the record the said district court of Lake county and the supreme court of Colo-

rado erred in holding that your petitioner had not the right under the laws of the United States to enter upon a possessory placer claim and discover and locate lodes prior to the time that said placer claim had applied for patent, and your petitioner further avers that in such record and the opinion of this court, error was committed to the detriment and injury of your petitioner in holding that the owner of a placer claim who had applied to the Government of the United States for a patent upon same, which said application had been rejected for the reason that the ground embraced therein was not territory subject to location as a placer and still had remaining possessory rights which he was entitled to assert against third persons locating said ground as lode claims and said court erred in rendering judgment against your petitioner and in favor of the plaintiffs in said suit, and in divers other manners and particulars involving questions arising under the constitution and laws of the United States as will more particularly appear from the record in said cause and the assignments of error made therein.

Wherefore your petitioner prays for the allowance of a writ of error and such other process as may cause said record to be removed to the Supreme Court of the United States and these errors to be corrected by that tribunal.

(Signed) THOMAS, BRYANT & LEE,
*Attorneys for Plaintiff in Error.*

Upon the foregoing petition, a writ of error to the Supreme Court of the United States is ordered this 26th day of March, A. D. 1902.

(Signed) JOHN CAMPBELL,
*Chief Justice of the Supreme Court of Colorado.*

In the Supreme Court of the State of Colorado.

THE CLIPPER MINING CO., Plaintiff in Error,
*v.*
THE ELI MINING & LAND CO., A. D. SEARL, F. C. Schroeder, *et al.*, Defendants in Error.

# 4115. Order for Writ of Error.

To Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, Greeting:

In the above entitled cause, judgment was rendered against the above named petitioner, The Clipper Mining Co. on the 3rd day of March, A. D. 1902 and in the hearing and determination of said cause, there were involved several Federal questions, and certain rights under the Constitution and statutes of the United States; and the said The Clipper Mining Co. petitioner, by its attorneys, Thomas, Bryant & Lee, has filed its petition, praying the allowance of a writ of error, removing this cause to the Supreme Court of the U. S. for further proceedings, and having duly considered said petition, it is considered that a writ of error should be allowed.

You are therefore commanded to prepare and forward a writ of

error wherein the said The Clipper Mining Co. is pl't'ff in error and the said The Eli Mining & Land Co. A. D. Searl, and F. C. Schroeder *et al.*, are d'f'ts in error, and forward the same to me with all due haste.

Witness the Honorable John Campbell, chief justice of the supreme court of the State of Colorado, on this 29th day of April A. D. 1902 and of the Independence of the United States the one hundred and twenty-sixth at Denver, in the State of Colorado.

JOHN CAMPBELL,
*Chief Justice of the Supreme Court*
*of the State of Colorado.*

5 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the chief justice and the honorable judges of the supreme court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Colorado, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Clipper Mining Company, plaintiff in error, and The Eli Mining and Land Company, A. D. Searl, F. C. Schroeder, *et al.* defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of the said The Clipper Mining Company, as by its complaint appears, we being
6 willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty (30) days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of

right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States the 29th day of April, in the year of our Lord one thousand nine hundred and two.

Seal U. S. Circuit Court, District of Colorado.

ROBERT BAILEY,
*Clerk of the Circuit Court of the United States for the District of Colorado,*
By CHARLES W. BISHOP,
*Deputy Clerk.*

Allowed by—
JOHN CAMPBELL,
*Chief Justice of the Supreme Court of the State of Colorado.*

7 *Return on Writ of Error.*

UNITED STATES OF AMERICA, }
*District of Colorado, State of Colorado.* }

In obedience to the command of the above and foregoing writ, I herewith transmit to the honorable the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the above entitled cause, together with all things concerning the same.

Witness my hand and the seal of the supreme court of the State of Colorado, at Denver, in said State, this 26th day of March, A. D. 1902.

Seal Supreme Court, State of Colorado.

HORACE G. CLARK,
*Clerk Supreme Court of the State of Colorado,*
By —— ——, *Deputy Clerk.*

8 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the Eli Mining and Land Company, A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, District of Columbia, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Colorado, wherein The Clipper Mining Company is plaintiff in error, and The Eli Mining and Land Company, A. D. Searl, F. C. Schroeder, *et al.*, are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John Campbell, chief justice of the supreme court of the State of Colorado, this 29th day of April, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States, the one hundred and twenty-sixth year, at Denver, in the State of Colorado.

JOHN CAMPBELL,
*Chief Justice of the Supreme Court of the State of Colorado.*

A copy of the foregoing citation was delivered to me on the 7 day of May A. D. 1902, and I hereby accept service thereof on behalf of the said defendants in error, The Eli Mining Company, A. D. Searl, F. C. Schroeder, *et al.*

CHARLES CAVENDER,
JOHN A. EWING,
*Attorneys for Defendants in Error,*
*The Eli Mining Company and A. D. Searl.*

9 UNITED STATES OF AMERICA, } ss:
*State of Colorado,* }

Know all men by these presents, that we, The Clipper Mining Company as principal, and Frank Cox and H. C. Rowley, as sureties, are held and firmly bound unto The Eli Mining & Land Company, F. C. Schroeder, A. D. Searl and the defendants in error in the case of The Clipper Mining Company, plaintiff in error, *vs.* The Eli Mining & Land Company *et al.*, defendants in error, No. 4115, in the supreme court of the State of Colorado, in the full and just sum of $500 to be paid to the said, The Eli Mining and Land Company and others, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 26th day of March in the year of our Lord, one thousand, nine hundred and two.

Whereas lately at the January term, A. D. 1902, in the supreme court of the State of Colorado in a case pending in said court between the said The Clipper Mining Company as plaintiff in error and The Eli Mining & Land Company, *et al.*, as defendants in error, the same being case No. 4115 on the docket of said court, judgment was rendered against the said The Clipper Mining Compaay for possession of certain real properties and costs and the judgment of the district court of Lake county in said cause was affirmed and the said The Clipper Mining Company have obtained a writ of error to reverse the said judgment of the supreme court of Colorado, and the citation has been issued directed to said, The Eli Mining and Land Company and others, citing and admonishing them to be and
10 appear at the regular term of the Supreme Court of the United States to be held at Washington, D. C. at the October term, A. D. 1902, now the condition of the above obligation is such that if the said The Clipper Mining Company shall, pursuant to said writ of error, pay and answer for all damages or costs if they fail

to make good their plea, then the above obligation to be void, else to remain on full force and virtue.

THE CLIPPER MINING COMPANY,
(Signed) By THOMAS, BRYANT & LEE, *Attorneys.*
(Signed) FRANK COX.
(Signed) H. C. ROWLEY.

Approved March 26, 1902.
(Signed) JOHN CAMPBELL,
*Chief Justice of the Supreme Court of Colorado.*

STATE OF COLORADO, }
*County of Arapahoe,* } ss:

—— —— and —— —— sureties on the within bond being each first duly sworn deposes and says: that he is worth in property the amount of said bond, over and above all his just debts and liabilities in property subject to levy and sale upon execution.

—— ——.
—— ——.

Subscribed and sworn to before me this — day of March, A. D. 1902.

—— ——.

11 In the Supreme Court of the United States.

THE CLIPPER MINING COMPANY, Plaintiff in Error,
*vs.*
THE ELI MINING & LAND COMPANY, A. D. SEARL, F. C. SCHROEDER, *et al.*, Defendants in Error.

Error to the supreme court of the State of Colorado.

Comes now the plaintiff in error in the above entitled cause, and avers that in the record and proceedings in said cause, the supreme court of the State of Colorado erred to the grievous injury of the plaintiff in error herein, in the following particulars, to-wit:

1. The court below erred in sustaining the action of the district court of Lake county in overruling the demurrer of defendants to the complaint of the plaintiffs.

2. The said supreme court erred in sustaining the action of the district court of Lake county in refusing to grant the motion of the defendant for judgment on the pleadings for the reasons set forth in the written motion of said defendants, and for the reasons appearing upon the face of the pleadings and record in said cause, which clearly entitled the defendant to judgment thereon.

3. The supreme court of Colorado erred in sustaining the action of the district court of Lake county in overruling the objec-
12 tion of the defendant to the introduction in evidence by the plaintiff of testimony concerning the location of the Searl

placer location, for the reason that under the issues in said cause as made up, the title claimed by the plaintiff had been declared void by the land office of the United States, and the court erred in admitting any evidence or testimony concerning said title contained in the bill of exceptions filed in said cause.

4. The supreme court of Colorado erred in sustaining the action of the district court of Lake county in admitting in evidence over the objection of the defendant, the opinion of the Secretary of the Interior of May 13th, 1896 as reported in the 22nd Land Decisions, page 527, for the reason that the said opinion was immaterial, incompetent and irrelevant under the issues.

5. The supreme court of the State of Colorado erred in sustaining the action of the district court of Lake county in finding upon the evidence that the Searl placer was duly located as required by law in 1877 and that the annual labor had been performed as required by law from — time to the time of trial as set forth in the findings of the court upon the testimony.

6. The supreme court of Colorado erred in finding as a matter of law that the defendant in said cause in the trial court, The Clipper Mining Company, had no right to enter within the limits of the Searl placer location and locate the lode mining claims mentioned herein.

7. The supreme court of Colorado erred in sustaining the trial court in finding as a matter of law that the discoverer of a lode mining claim had no right to enter within the limits of a prior located placer claim and before the said placer claimant had applied for patent to make a discovery and location of a lode mining claim.

13 8. The supreme court of Colorado erred in sustaining the ruling of the trial court in holding that the decision of the Land Department of the Government of the United States holding certain lands not to be subject to location and patent as a placer mining claim were not conclusive upon the courts and binding upon the courts and all other persons who should attempt to locate said land as a placer mining claim.

9. The supreme court of Colorado erred in affirming the judgment of the district court of Lake county.

10. The supreme court of Colorado erred in its main opinion in holding that the decisions of the Land Department of the United States made in rejecting the application of a claimant to the public lands for patent is not as conclusive and binding as the decision of the same department in accepting an application for patent and issuing a patent thereon.

11. The supreme court of Colorado erred in holding that the decisions of the Land Department in controversies concerning the public lands properly brought before that department are not *res judicata* upon the courts where the same matters are afterwards attempted to be reviewed by the courts.

12. The supreme court of Colorado erred in its opinion in holding that the owner of a valid placer claim is entitled to such exclu-

sive possession thereof that before such owner applies for patent, third parties are not entitled to enter within said placer claim and discover and locate lodes which are shown to have an actual existence within said placer.

13. The supreme court of Colorado erred in its opinion upon a petition for rehearing, in holding that an application for a
14 patent upon a placer claim which is rejected by the Land Department of the United States fixed the time at which the question of when a known lode exists within a placer is to be determined.

14. The supreme court of Colorado erred in its ruling upon the petition for rehearing in rejecting the application of the plaintiff in error to file a supplemental record.

And in divers other particulars the said the supreme court of the State of Colorado erred to the injury of this plaintiff in error.

Wherefore the plaintiff in error prays that the judgment of the supreme court of the State of Colorado may be reversed and set aside and for naught held.

(Signed) THOMAS, BRYANT & LEE,
*Attorneys for Plaintiff in Error.*

Endorsed: No. 4115. In the supreme court of Colorado. The Clipper Mining Company, plaintiff in error, *versus* The Eli Mining & Land Company *et al.*, defendants in error. Petition for writ of error, bond, and assignment of errors to Supreme Court of the United States. Filed in supreme court, Mar. 26, 1902. Horace G. Clark, clerk. Thomas, Bryant & Lee, attorneys for plaintiff in error. 621–627 Ernest and Cranmer bldg., Denver, Colo.

15 In the Supreme Court of the State of Colorado.

THE CLIPPER MINING COMPANY Plaintiff in Error,
*vs.*
THE ELI MINING AND LAND COMPANY ET AL., Defendants in Error. } No. 4115.

Comes now the plaintiff in error by Thomas, Bryant & Lee its attorneys, and alleges that in the record and proceedings in said cause in the court below manifest error was committed by said court, to the injury and prejudice of said plaintiff in error in the following particulars, to-wit:

1. The court below erred in overruling the demurrer of the defendants to the complaint of the plaintiff.

2. The court below erred in refusing to grant the motion of the defendant for judgment on the pleadings, for the reasons set forth in the written motion of the said defendants, and for the reasons appearing upon the face of the pleadings in said cause which entitle the defendants to judgment thereon.

3. The court below erred in overruling the objection of the defendants to the introduction in evidence by the plaintiff of testimony

concerning the location of the Searl placer or the character of the ground covered thereby, or any testimony concerning the title claimed by the plaintiffs under the said Searl placer location, for the reason that under the issues in this cause, as made up, the
16 title claimed by the plaintiff had been declared void by the land office of the United States, and in admitting any evidence or testimony tending to prove these matters, as more fully set forth by the bill of exceptions filed in said cause.

4. The court below erred in admitting in evidence over the objection of the defendant the opinion of the Secretary of the Interior of May 13, 1896, as reported in the 22 Land Decisions, page 527, for the reason that said opinion was immaterial, incompetent and irrelevant under the issues, and was not offered in evidence at the proper time by the said plaintiffs.

5. The court below erred in finding from the evidence that the Searl placer was duly located, as required by law, in 1877, and that the annual labor had been performed, as required by law, from that time to the time of trial, as set forth in the findings of the court upon the testimony, at the close of the testimony.

6. The court below erred in finding as a matter of law that the said defendant, The Clipper Mining Company, had no right to enter within the limits of the Searl placer and locate the lode mining claims mentioned herein.

7. The court below erred in finding as a matter of law that the discoverer of a lode mining claim had no right to enter within the limits of a prior located placer claim and before the said placer claimant had applied for a patent, and make a discovery and location of said lode mining claim.

8. The court below erred in holding that the decisions of the Land Department of the Government of the United States holding certain land to be not subject to location and patent as a placer
17 mining claim, were not conclusive upon the courts and binding upon the courts and all other persons who should attempt to locate said land as a placer mining claim.

9. The court below erred in entering judgment in said cause in favor of the plaintiff and against the defendant.

10. The court below erred in refusing to enter judgment in said cause in favor of the defendant and against the plaintiff upon the ground in controversy.

And in divers other particulars the court below erred, to the prejudice of the defendant in said cause.

THOMAS, BRYANT & LEE,
*Attorneys for Plaintiff in Error.*

Endorsed: No. 4115—In the supreme court of Colorado—The Clipper Mining Company plaintiff in error *versus* The Eli Mining & Land Company *et al.*, defendants in error—Assignment of errors—Filed Sept. 19, 1899—Horace G. Clark clerk

18 UNITED STATES OF AMERICA:

Be it remembered, that at the December term, A. D. 1895, of the district court of the fifth judicial district of the State of Colorado, held within and for the county of Lake, commencing on Monday, the second day of December, A. D. 1895, begun and held in the city of Leadville, county of Lake and State of Colorado, at the court house therein,

Present: Hon. F. W. Owers, judge of said court; L. R. Thomas, Esq., district attorney; —— ——, bailiff of said court; Gavin Leslie, Esq., sheriff of Lake county; John H. Dunn, Esq., clerk of said court.

The following, among other proceedings, were had, to-wit:

19 Be it remembered, that heretofore, and on, to-wit, the 15th day of January, A. D. 1896, it being one of the regular juridical days of the December term 1895, of the district court of the fifth judicial district, sitting within and for the county of Lake, State of Colorado, the following proceedings, *inter alia*, were had and entered of record in said court, before the Hon. M. S. Bailey, presiding at request of Hon. F. W. Owers, judge.

THE ELI MINING & LAND CO. ET AL.
*vs.*
THE CLIPPER MINING COMPANY. } 4580.

At this day come the parties hereto by their attorneys respectively. And thereupon this cause coming on to be heard upon the demurrer of defendant to the complaint herein and by consent of the parties hereto being submitted to the court without argument, and the court being now well advised in the premises doth overrule said demurrer.

And thereupon it is ordered by the court that the defendant herein have time and twenty days in which to file its answer and the plaintiffs have time and ten days after the filing of the answer herein in which to plead.

M. S. BAILEY, *Judge.*

20 TUESDAY, *October 26th, A. D.* 1897.

In Chambers.

STATE OF COLORADO, } ss:
*County of Lake,* }

In the District Court.

THE ELI MINING & LAND COMPANY ET AL., Plaintiffs,
*against*
THE CLIPPER MINING COMPANY, Defendant.

The demurrer of the plaintiffs to the second, third, fourth, fifth and sixth defenses contained in the answer of defendant to the com-

plaint of plaintiffs herein coming on this day to be heard before the undersigned judge of the district court of the eleventh judicial district of the State of Colorado, agreeable to stipulation entered into between the record attorneys of the respective parties hereto, plaintiff appearing by John A. Ewing, Esq., by written brief and the defendant by Messrs. Thomas, Bryant & Lee its attorneys also by written brief, and the said judge of said court being now well and fully advised in the premises doth overrule said demurrer to each of said defenses.

To which ruling of said judge plaintiffs by their attorney duly object and except. Time and until ten days after notice of this order given to plaintiffs' said attorney is given to plaintiffs in which to elect to stand by their said demurrer or to reply to said second, third, fourth, fifth and sixth defenses set up in defendant's
21 said answer, as they may be advised.

Dated October 26, 1897.

(Signed) M. S. BAILEY, *Judge.*

And afterwards, and on, to-wit, the 22d day of November, A. D. 1897, it being one of the regular juridical days of the August term, 1897, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, before Hon. F. W. Owers.

THE ELI MINING & LAND COMPANY ET AL.
*vs.*
THE CLIPPER MINING COMPANY. } 4580.

At this day on motion of defendant, it is ordered by the court that another judge other than the Hon. Frank W. Owers, be called in to try the issues in this cause.

And afterwards, and on, to-wit, the 31st day of January, A. D. 1898, it being one of the regular juridical days of the December term, 1897, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, before the Hon. Thomas A. Rucker, district judge, presiding at request of Hon. F. W. Owers, judge.

THE ELI MINING & LAND COMPANY ET AL.
*vs.*
THE CLIPPER MINING COMPANY. } 4580.

At this day come the plaintiffs herein by J. A. Ewing, Esq., and Charles Cavender, Esq., their attorneys, and the said defendant appears by Harry Lee, Esq., of counsel for said defendant.
22 And thereupon on consent of the said parties, it is ordered by the court that the hearing of the motion of defendant for judgment on the pleadings herein be and the same is hereby set down for 2 o'clock p. m.

At the aforesaid mentioned hour come the respective parties

hereto by their attorneys respectively. And thereupon this cause comes on to be heard upon the motion of defendant herein for judgment on the pleadings, is argued by counsel, and the court being not now sufficiently advised in the premises, doth take the same under further consideration until February 1st, 1898.

And afterwards, and on, to-wit, the 1st day of February, A. D. 1898, it being one of the regular juridical days of the December term 1897, of said court, the following proceedings, *inter alia*, were had and entered of record in said court before the Hon. Thomas A. Rucker, district judge, presiding at request of Hon. F. W. Owers, judge.

THE ELI MINING & LAND COMPANY ET AL.
*vs.*
THE CLIPPER MINING COMPANY.

The motion for judgment on the pleadings in this case having been argued by counsel and taken under advisement,

Now at this day the court being sufficiently advised in the premises; finds that an issue has been joined in this cause which requires a trial to determine; the court further finds that the matters insisted upon by defendants to sustain said motion concern rulings and actions of the Land Department of the United States Government, which are reserved for further consideration upon the trial of this cause:

23 It is therefore ordered that the motion be overruled: to which order the defendant excepted.

And thereupon on application of the defendants to have this cause set down for trial it appearing by affidavits that plaintiffs are unable at this time to have the case set down for trial.

It is in open court agreed and stipulated by counsel that this cause may be set down for trial on the 25th day of April A. D. 1898 and that the Honorable Frank W. Owers, judge of the fifth judicial district be requested to call some other district judge of the State of Colorado to preside at said trial.

And afterwards, and on, to-wit, the 25th day of April, A. D. 1898, it being one of the regular juridical days of the March term, 1898, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, before the Hon. Thomas A. Rucker, district judge, presiding at request of Hon. F. W. Owers, judge.

THE ELI MINING & LAND CO. ET AL.
*vs.*
THE CLIPPER MINING COMPANY. } 4580.

At this day come the plaintiffs herein by John A. Ewing, Esq., Charles Cavender, Esq., and W. W. Davis, Esq., their attorneys, and the said defendant by Thomas, Bryant & Lee its attorneys. And

thereupon this cause comes on to be tried before the court, without a jury, a jury herein being expressly waived by both parties hereto. Thereupon comes on for hearing the evidence herein, and the same not being concluded at the hour of adjournment, the further hearing of said cause is continued until to-morrow morning.

24 And afterwards, and on, to-wit, the 26th day of April, A. D. 1898, it being one of the regular juridical days of the March term, 1898, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, before the Hon. Thomas A. Rucker, district judge, presiding at request of Hon. F. W. Owers, judge.

THE ELI MINING & LAND CO. ET AL.
*vs.*
THE CLIPPER MINING COMPANY. } 4580.

At this day come again the said parties by their attorneys respectively. And thereupon the trial of the issues herein joined is resumed. Thereupon after the plaintiffs had rested their case defendants move to dismiss this suit as in case of nonsuit, which motion is argued by counsel, and the court being now well advised in the premises, doth deny said motion.

And the evidence of this case not being concluded at the hour of adjournment, the further hearing of same is hereby continued until to-morrow morning at 10 o'clock a. m.

And afterwards, and on, to-wit, the 27th day of April, A. D. 1898, it being one of the regular juridical days of the March term 1898, of said court, the following proceedings were had and entered of record in said court, before the Hon. Thomas A. Rucker, district judge, presiding at request of Hon. Frank W. Owers, judge.

25 THE ELI MINING & LAND CO. ET AL.
*vs.*
THE CLIPPER MINING COMPANY. } 4580.

At this day come again the said parties by their attorneys respectively. And thereupon the further hearing of the issues herein joined comes on to be heard. And the evidence not being concluded at the hour of adjournment,

It is ordered by the court that the further hearing of this cause be and the same hereby is continued until April 28th, A. D. 1898.

And afterwards, and on, to-wit, the 28th day of April, A. D. 1898, it being one of the regular juridical days of the March term, 1898, of said court, the following proceedings, *inter alia*, were had and entered of record before the Hon. Thomas A. Rucker, district judge, presiding at request of Hon. Frank W. Owers, judge.

THE ELI MINING & LAND CO. ET AL.
*vs.*
THE CLIPPER MINING COMPANY. } 4580.

At this day come again the said parties by their attorneys respectively. Thereupon the trial of the issues herein joined is resumed.

And the court having heard the evidence, and the arguments of counsel, and not being sufficiently advised in the premises, doth take the same under advisement.

And it is further ordered by the court that when the decision in this cause is rendered, it shall be rendered as of this day.

26 Thereupon it is ordered by the court that plaintiffs have time and one week in which to present their brief herein, and defendant one week thereafter in which to answer, and plaintiffs one week thereafter in which to reply.

SATURDAY, *May 28th, A. D.* 1898.

The following proceedings, *inter alia*, were had before the Hon. Thomas A. Rucker, sitting in chambers, upon the request of Hon. Frank W. Owers, judge of the fifth judicial district.

THE ELI MINING & LAND CO. ET AL.
*vs.*
THE CLIPPER MINING COMPANY. } 4580.

At this day come the parties hereto and ask and have leave to withdraw their respective exhibits filed herein for the period of thirty days upon receipting to clerk therefor.

THOMAS A. RUCKER,
*Judge, Acting for and in the Absence of*
*Hon. Frank W. Owers, District Judge.*

WEDNESDAY, *June 8th, A. D.* 1898.

The following proceedings, being the decision was filed on the above mentioned date, but it is to be entered of record as of the 28th day of April, A. D. 1898.

27 THE ELI MINING & LAND COMPANY, a Corporation, etc.; A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
*vs.*
THE CLIPPER MINING COMPANY, a Corporation, etc., Defendant. } No. 4580.

This cause coming on to be heard upon the 25th day of April A. D. 1898, the plaintiffs appearing by Messrs. J. A. Ewing and Charles Cavender, and the defendants by Messrs. Thomas, Bryant & Lee, a jury herein being expressly waived by the parties hereto, and this cause being tried to the court.

Now on this 28th day of April, A. D. 1898, the hearing of this cause being concluded, and the court having heard all the evidence produced, as well on the part of the defendant as on that of the plaintiffs, and the arguments of counsel thereon, and not being sufficiently advised in the premises, doth take said cause under advisement; and doth order that the finding and judgment herein when rendered, shall be entered of record as of this day.

And the court, after further considering said cause, and being now fully advised in the premises, doth find the issues herein joined for the plaintiffs; and that they are the owners of and entitled to the possession of the ground described in the complaint.

It is therefore considered, ordered and adjudged by the court
28 that the said plaintiffs are the owners and entitled to the possession of the premises described in the complaint of the plaintiffs herein, viz., that portion of the placer claim called the Searl placer claim, situate in the California mining district, county of Lake and State of Colorado, bounded and described as follows: Beginning at corner No. 2, U. S. survey No. 6965, thence "A" S. 81° 36′ W. 490.9 feet; thence "B" S. 8° 30′ E. 100 feet; thence "C" S. 71° 26′ 27″ E. 61 feet; thence "D" S. 81° 36′ W. 13.58 feet; thence "E" N. 69° 51′ W. 178.12 feet; thence "F" S. 75° 35′ W. 144.2 feet; thence "G" S. 81° 36′ W. 23.7 feet; thence "H" N. 77° W. 135.6 feet; thence "I" N. 8° 24′ W. 58.8 feet; thence "J" S. 81° 36′ W. 150 feet; thence "K" N. 77° W. 161 feet; thence "L" N. 8° 24′ W. 1441.2 feet; thence "M" N. 81° 36′ E. 300 feet; thence "N" S. 8° 24′ E. 108.3 —; thence "O" N. 81° 36′ E. 300 feet; thence "P" S. 8° 24′ E. 70.1 feet; thence "Q" N. 81° 36′ E. 264.4 feet; thence "R" S. 50° 30′ E. 52.3 feet; thence "S" S. 8° 24′ E. 142.3 feet; thence "T" S. 81° 30′ W. 132 feet; thence "U" S. 50° E. 199 feet; thence "V" S. 8° 24′ E. 168.63 feet; thence "W" N. 81° 36′ E. 150 feet; thence "X" S. 50° E. 225.9 feet; thence "Y" S. 8° 24′ E. 703.87 feet to place of beginning; comprising 35.59 acres more or less.

And that they have and recover the same from the defendant, together with their costs laid out and expended; and that they may have execution therefor.

Now comes the defendant and excepts to the findings and judgment in the above cause, and prays an appeal to the supreme court of the State of Colorado; appeal allowed, conditioned upon the filing
29 of a bond with sureties to be approved by the clerk within thirty (30) days from the filing of judgment and decision in the sum of one thousand (1000.00) dollars; and defendant given ninety (90) days to prepare and tender bill of exceptions.

THOMAS A. RUCKER,
*District Judge, Presiding at Request of*
*Hon. Frank W. Owers, Judge.*

30 STATE OF COLORADO, } ss:
*County of Lake,* }

In the District Court within and for said County.

THE ELI MINING & LAND COMPANY, a Corporation, etc.; A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
*vs.*
THE CLIPPER MINING COMPANY, a Corporation, etc., Defendant.
} Complaint.

Plaintiffs complain and allege:

I.

That the plaintiff, The Eli Mining & Land Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Colorado;

II.

That the defendant, The Clipper Mining Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Colorado;

III.

That on or about the 14th day of December, A. D. 1877, John Leahey, Thomas Starr, David Fulton, George Young, Andrew Baldridge, F. H. Edwards and J. B. Hall, each and all of them being at that time citizens of the United States over the age of twenty-one years, discovered and located, upon the unoccupied and unappropriated mineral domain of the United States, a certain placer mining claim, which is situated in what is known as the California
31 mining district, in the county of Lake and State of Colorado, and which is described by metes and bounds as follows:

Beginning at corner No. 37 of U. S. survey No. 255 thence N. 2° E. 422.8 ft.; thence N. 2° 35′ E. 440.5 ft.; thence N. 10° 50′ E. 560.7 ft.; thence N. 10° 37′ E. 845 ft.; thence N. 32° 6′ E. 483 ft.; thence N. 49° 13′ E. 155.5 ft.; thence N. 78° 42′ E. 142 ft.; thence S. 63° 38′ E. 260 ft.; thence S. 77° E. 1841 ft.; thence S. 12° W. 1420 ft.; thence S. 13° W. 1420 ft.; thence N. 77° W. 1841.4 ft.; thence N. 75° 35′ W. 430.3 ft. to place of beginning containing 157.02 acres of placer mining ground.

Variation 15° E.

IV.

That by virtue of said locations and divers certain mesne conveyances these plaintiffs have become and now are the owners of said placer mining claim and have and claim the legal right to occupy and possess said premises and enjoy the same and are entitled to the possession thereof by virtue of a full compliance of the local

laws and rules of miners in said mining district, the laws of the United States and of the State of Colorado, by preemption and purchase and by actual prior possession as a placer mining claim located upon the public domain of the United States.

V.

That on or about the 25th day of November, A. D. 1890, the defendant and its grantors wrongfully entered upon a portion or parcel of said placer claim, then and at that time in the quiet and peaceable possession of plaintiffs and their grantors and described as follows, to-wit:

32 Beginning at corner No. 2, U. S. survey No. 6965, thence "A" S. 81° 36′ W. 490.9 ft., thence "B" S. 8° 30′ E. 100 ft.; thence "C" S. 71° 26′ 27″ E. 61 ft.; thence "D" S. 81° 36′ W. 13.58 ft.; thence "E" N. 69° 51′ W. 178.12 ft.; thence "F" S. 75° 35′ W. 144.2 ft.; thence "G" S. 81° 36′ W. 23.7 ft.; thence "H" N. 77° W. 135.6 ft.; thence "I" N. 8° 24′ W. 58.8 ft.; thence "J" S. 81° 36′ W. 150 ft.; thence "K" N. 77° W. 161 ft.; thence "L" N. 8° 24′ W. 1441.2 ft.; thence "M" N. 81° 36′ E. 300 ft.; thence "N" S. 8° 24′ E. 108.3 ft.; thence "O" N. 81° 36′ E. 300 ft.; thence "P" S. 8° 24′ E. 70.1 ft.; thence "Q" N. 81° 36′ E. 264.4 ft.; thence "R" S. 50° 30′ E. 52.3 ft.; thence "S" S. 8° 24′ E. 142.3 ft.; thence "T" S. 81° 30′ W. 132 ft.; thence "U" S. 50° E. 199 ft.; thence "V" S. 8° 24′ E. 168.63 ft.; thence "W" N. 81° 36′ E. 150 ft.; thence "X" S. 50° E. 225.9 ft.; thence "Y" S. 8° 24′ E. 703.87 ft. comprising 35.59 acres more or less, as shown by plat marked "Exhibit B" filed on the — day of October, A. D. 1893, in the land office of the United States, at Leadville, in said State with the adverse claim of said plaintiffs against the entry of said last described premises, described in defendant's application for patent therefor, on file in said land office as U. S. survey lot No. 6965.

VI.

That defendant and its grantors have ever since hitherto wrongfully withheld the possession of said last described parcel of said placer claim from the plaintiffs to their damage in the sum of five thousand dollars ($5,000).

33 VII.

That this suit is brought in support of said adverse claim and that plaintiffs have necessarily disbursed and paid out the sum of two hundred and fifty dollars ($250.) for plats, abstracts and other papers filed in said land office with their said adverse claim and also a reasonable attorney's fee of $250 for the expense and labor of preparing said adverse claim.

Wherefore, plaintiffs demand judgment against the defendant:

1st. For the recovery of possession of said last described part or parcel of said placer claim;

2d. For the sum of five thousand dollars ($5,000.) damages;

3d. For the sum of five hundred dollars ($500) expended in support of said adverse claim;
4th. For costs of suit.

FRANK W. OWERS,
*Attorney for Plaintiffs.*

JNO. A. EWING, *Of Counsel.*

(Endorsement on the back:) 4580 In district court Lake county Eli Mining and Land Co. *et al. vs.* The Clipper Mining Co. Complaint Filed Nov. 23. 1893. Geo. P. Brown clerk by F. M. Goddard deputy Frank W. Owers, attorney at law, Leadville, Colo.

34 STATE OF COLORADO, *Lake County,* } *ss:*

In the District Court of the Fifth Judicial District of Colorado in and for the County of Lake.

THE ELI MINING & LAND COMPANY, a Corporation, etc.; A. D. Searl, F. G. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
*vs.*
THE CLIPPER MINING COMPANY, a Corporation, etc., Defendant. } Summons.

The People of the State of Colorado to the defendant above named, Greeting:

You are hereby required to appear in an action brought against you by the above named plaintiff-, in the district court of Lake county, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county; or, if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you, according to the prayer of the complaint; and, if a copy of the complaint in the above entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time herein-above specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to recover possession of a certain part or parcel of a certain placer claim described in the complaint filed herein; 2nd. For the sum of five thousand ($5000) dollars damages;
3d. For the sum of five hundred ($500) dollars expended in
35 support of said adverse claim; 4th. For costs of suit, as will more fully appear from the complaint in said action to which reference is here made; a copy of which is hereto attached. And you are hereby notified that if you fail to appear and to answer the said complaint, as above required, the said plaintiff- will apply for judgment by default against you, according to the prayer of said complaint.

Given under my hand and the seal of said court in said county, this 23d day of November, A. D. 1893.

[OFFICIAL SEAL.]

GEO. P. BROWN,
*Clerk of District Court,*
By F. M. GODDARD,
*Deputy Clerk.*

(Endorsed.)

STATE OF COLORADO, } ss:
*Lake County,* }

I do hereby certify that I have duly served the within summons, together with a copy of the complaint in the within stated action, on this 24th day of November, A. D. 1893, on the within named defendant company, The Clipper Mining Company, a corporation, by personally delivering to and leaving with S. M. Carlton, general manager for the said defendant company, The Clipper Mining Company, a copy of said summons, together with a copy of the complaint in the action therein mentioned, thereto attached. The president, secretary, treasurer or other chief officer not found in my county after diligent search and inquiry.

P. J. KENNEDY, *Sheriff,*
By GEO. W. PELTER,
*Deputy Sheriff.*

36 (Further endorsed:) No. 4580. Summons. Lake county district court. The Eli Mining Company *et al.*, plaintiffs, *vs.* The Clipper Mining Company, defendant. State of Colorado, county of Lake, *ss.* Office of the sheriff of said county. Received Nov. 23d 1893, P. J. Kennedy, sheriff. By Thos. F. Dunn, deputy. Sheriff's fees: Service $ .75 mileage $ 20 Total, $ 95 Filed this 5th day of December A. D. 1893, Geo. P. Brown, clerk, by F. M. Goddard, deputy. F. W. Owers, att'y for pl't'ff.

STATE OF COLORADO, } ss:
*County of Lake,* }

In the District Court.

THE ELI MINING AND LAND COMPANY, a Corporation; A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
*vs.*
THE CLIPPER MINING COMPANY, a Corporation, Defendant.
} Demurrer.

Now comes the above named defendant and demurrers to the complaint herein, and for grounds of demurrer says: That the said complaint does not state facts sufficient to constitute a cause of action. And because the said complaint is uncertain and unintelligible in this that in the third paragraph of said complaint the plain-

tiffs claim to have located a single placer claim, and in the fourth paragraph it appears that there was more than one location; so that it cannot be determined from said complaint whether plaintiffs rely upon one location or several.

A. T. GUNNELL,
*Attorney for Defendant.*

37 (Endorsement on the back:) No. 4580 District court, Demurrer The Eli Mining & Land Company *vs.* The Clipper Mining Company Filed Dec. 13, 1893. Geo. P. Brown clerk. By F. M. Goddard deputy A. T. Gunnell attorneys for ——.

STATE OF COLORADO, }
*County of Lake,* } *ss:*

In the District Court.

THE ELI MINING & LAND COMPANY, a Corporation; A. D. SEARL, F. C. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
*vs.*
THE CLIPPER MINING COMPANY, a Corporation, Defendant.

Comes now the above named defendant by its attorneys, and answering the complaint of the plaintiffs heretofore filed in said cause,

Admits the allegations contained in the first and second paragraphs of said complaint as to the incorporation and existence of the Eli Mining and Land Company and the Clipper Mining Company.

Denies that on the 14th day of December, A. D. 1877, or at any other time, John Leahey, Thomas Starr, David Fulton, George Young, Andrew Baldridge, F. H. Edwards and J. B. Hall, or any one else, discovered and located upon the unappropriated mineral domain of the United States a certain placer mining claim in the California mining district, State of Colorado, as described in said complaint and as set forth in paragraph III of said complaint; and concerning the allegations in said paragraph as to the citizen-
38 ship of said parties, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Denies that by virtue of said locations and divers mesne conveyances from the locators thereof, or by any ways or means whatsoever, the plaintiffs are the owners of said placer mining claim, or have any right or claim to occupy and possess said premises.

Denies that they are entitled to the possession of said premises described, or any part thereof, by virtue of a full compliance, or any compliance, with the rules and customs of miners, the laws of the United States, or of the State of Colorado.

Denies that said plaintiffs have any right, title or interest in or to any part or portion of said ground described in the complaint or have any title to the same, or are in any way interested therein:

Denies that on or about the 25th day of November, A. D. 1890, or at any other time, the defendant and its grantors, wrongfully entered upon a portion or part of any placer claim belonging to the plaintiffs herein.

Denies that at that time or any other time, the said placer claim was in the quiet and peaceable possession of said plaintiffs or their grantors.

Admits that the ground described in paragraph 5 of said complaint by metes and bounds, comprising 35.59 acres, more or less, in the California mining district, county of Lake and State of Colorado, was on the 25th day of November, A. D. 1890, and had been for a long time prior thereto in the possession of this defendant and its grantors and alleges that this defendant and its grantors
39 had at all times the right to occupy said premises, and were lawfully entitled to hold and occupy the same; and that none of the plaintiffs in this suit had any right or title to any part of portion of the same.

Deny that this defendant, by holding possession of said ground or otherwise, has ever damaged the plaintiffs in this suit in the sum of five thousand dollars, or any amount. And as to whether or not this suit is brought in support of an adverse claim, and the plaintiffs have expended any sum in preparing plats or are entitled to a reasonable attorney's fee, these defendants have not and cannot obtain sufficient knowledge or information upon which to base a belief, but deny that they are entitled to any attorney's fees or any sum whatever for preparing said plats or any papers in any adverse or other suit of any kind.

II.

And for a second and further defense this defendant alleges:

First. That it is a corporation organized and existing under and by virtue of the laws of the State of Colorado; that on or about the 14th day of December, A. D. 1877, the grantors of the plaintiff herein desirous of obtaining the title to certain valuable ground situated near the town of Leadville, and known by said parties to contain valuable mineral deposits of the character of which is commonly known as lode deposits; and further knowing that said ground would some time be valuable as town lots by reason of its proximity to the city of Leadville, devised a fraudulent scheme and conspiracy by which they determined to take up said land as a
40 placer mining claim, well knowing that the same was not ground that could be worked as a placer mine, and that it was not ground which was valuable for placer mining purposes; and in pursuance of said scheme and conspiracy they did attempt to locate upon said ground a certain placer mining claim described by metes and bounds, substantially as set forth in paragraph 3 of the complaint filed in this cause; and they thereafter filed application with the officers of the land office located at Leadville, in the county of Lake and district of Colorado, for a patent to said ground; that their application to receive a patent was contested, upon the

ground that said pretended placer claim was fraudulent; that said ground was never placer ground, was valuable only for the lode claims that it contained, and for townsite purposes; that a full hearing was had upon said contest before the officers of the United States land office at Leadville; and after a full hearing, said officers decided that said contest was well founded, and that the applicants for a patent to said ground as placer ground were not entitled thereto; that said ground was not placer, could not be taken up as a placer mining claim under the laws of the United States, and was not subject to entry under said laws as a placer mining claim, and that said ground was valuable only for the lode claims which it contained, and for townsite purposes; and said land officers refused to permit the so-called locators of said placer claim to enter the same as a placer mining claim; that the plaintiffs' grantors herein appealed from said decision of the land officers at Leadville to the Commissioner of the General Land Office of the United States at Washington, D. C. where another full hearing was had, and said Commissioner affirmed the decision of the officers of the
41 land office at Leadville, Colorado; that thereupon the grantors of the plaintiffs herein appealed from said decision of the Commissioner of the General Land Office of the United States to the honorable Secretary of the Interior where another full hearing was had and said Secretary of the Interior on the 13th day of November A. D. 1890 affirmed the decision of the Commissioner of the General Land Office, and by reason of said facts, the Government of the United States, by its proper officers has fully adjudicated and determined the fact to be that the land described in said complaint, and concerning which this suit is brought is not land which can be taken up as a placer mining claim, and that any attempted entry of the same as placer mining ground is void and of no effect, and has expressly determined that the title set up in said complaint claimed by the grantors of the plaintiffs was void and of no effect, but has been cancelled and held for naught by the proper officers of the United States, by reason of which fact the said plaintiffs have no right to set up the same against this defendant or any one else.

## III.

This defendant further alleges that on or about the 25th day of November A. D. 1890 its grantors, being all of them citizens of the United States, went upon the unoccupied public mineral domain of the United States, in the California mining district, county of Lake and State of Colorado, and located thereon five certain lode mining claims, known respectively as the Clipper, Congress, Capitol, Villa and Acme, and in all respects complied with the provisions of the rules and customs of the miners in said mining district, with the laws of the United States and of the State of Colorado in regard to the discovery of mineral, the posting of stakes, the filing of a location certificate, the sinking of a discovery shaft, the doing of
42 the assessment work, and all other acts required by said rules and customs in said laws; and that since said time this de-

fendant and its grantors have fully complied with the provisions of said acts by doing the annual assessment upon each of said claims, and that afterwards the original locators of said claims conveyed the same to this defendant and that this defendant has and claims the legal right to occupy and possess all of said mining claims, and is entitled to the possession thereof by virtue of a full compliance with the local laws and rules of miners in said mining district, with the laws of the United States and of the State of Colorado, by purchase and preemption and by actual prior possession as lode mining claims located on the public domain of the United States and that the premises sued for in said complaint are parcel of said lode mining claims, and are the property of this defendant; and said plaintiff is not entitled to the ownership or possession of said property; and that at the time the said pretended placer mining claim of the complainants herein was attempted to be located the lodes upon which the above mentioned lode mining claims were located were known lodes; that the locators of said placer mining claims knew that said lodes existed within said ground, and the same were well known lodes and were not subject to location as a placer mining claim, and could not be embraced within the limits of the so-called placer mining claim of the plaintiffs herein.

## IV.

And for a further and separate defense the defendant says that heretofore and on to-wit the 10th day of November A. D. 1882, the above-named plaintiff, A. D. Searl, the grantor of his co-
43 plaintiffs above named, being then and there by divers mesne conveyances the alleged and pretended owner of the said Searl placer as described in said complaint made his amended application for a patent to the same, it being amended survey No. 435, in the United States land office situated at Leadville, Colorado, in which district the territory herein involved was situated; that said amended application for patent was thereafter by the register and receiver of said land office rejected and cancelled for the reason that the territory therein embraced was not placer ground or subject to location as such, and because the said plaintiff Searl and his grantors had not complied with the law in making said pretended placer location; that the said Searl appealed from such decision of the said register and receiver to the Commissioner of the General Land Office, who thereafter and on, to-wit, the 6th day of March A. D. 1886, after a full and legal hearing, sustained the decision of the said register and receiver; that the said Searl thereafter appealed from such decision of the Commissioner to the Secretary of the Interior of the United States, and thereafter and on, to-wit, the 13th day of November, A. D. 1890, the said Secretary of the Interior fully affirmed and upheld the decisions of the register and receiver and of the Commissioner aforesaid, whereby the said pretended location of the Searl placer and the application for patent thereon was wholly cancelled, set aside and for naught held, and the same became and

was wholly unappropriated public domain so far as the rights or claim of title of the plaintiff were concerned and was not subject to placer location; that thereafter and on, to-wit, the 25th day of November, A. D. 1890, the defendant company, by
44 its grantors, each of whom were then and there citizens of the United States over the age of twenty-one years, went upon the said premises and performed all of the necessary acts in compliance with the mining regulations of said district and the statutes of the United States and of the State of Colorado necessary to and did, in fact, locate the Clipper, Congress, Capital, Villa and Acme Lode claims upon lodes or veins then and for a long time prior thereto known to exist within the limits of said pretended placer; that ever since said location this defendant and its grantors by the filing of location certificates, the marking of boundaries, the sinking of shafts, and the doing of assessment work has fully complied with the law in each and every particular and now is and ever since hitherto has been entitled to the ownership and possession of said lode claims; that said plaintiffs have never, since the rendering of the decision of the Secretary of the Interior aforesaid canceling their application, done or performed the necessary or any acts to make a valid placer location under the law upon said premises; that ever since the said 25th day of November, A. D. 1890, the defendant company and its grantors have been in the open and undisturbed possession of the lodes, ledges and deposits which ever since said date have been well known to exist upon each of said Clipper, Congress, Capital, Villa and Acme Lode claims and upon which they as hereinabove described are located.

And the defendant further says that the said lodes, veins and deposits were well known to exist within the limits of the said pretended Searl placer at all the times herein mentioned and especially at the time the plaintiff Searl made his application for a
45 patent to said placer, and yet, notwithstanding the fact that said lodes were known to exist and the plaintiff Searl knew of their existence within the limits of said placer claim, his said application for patent for such placer claim did not include an application for any of the said veins or lode claims whereby the said Searl and these plaintiffs fully waived any claim or right thereto and cannot thereafter be heard in any claim of right to the possession of the said veins or of the lode claims of this defendant under their said placer location.

V.

And the defendant company, for a further and separate answer, says: That heretofore and on, to-wit, the 10th day of November, A. D. 1882, the above-named plaintiff, A. D. Searl, being then and there a grantee by divers mesne conveyances of the parties alleged in the plaintiffs' complaint to have been the locators of the said alleged Searl placer on behalf of himself and as the grantor of his co-plaintiffs made his amended application for a patent to the said placer, the same being amended survey No. 435; that at the date of

said application for patent there were several known lodes, ledges and veins within the limits of said pretended placer claim and that said application for a patent to said placer claim did not include the application for patent to such veins or lodes; that thereafter the grantors of the defendant company, each being then and there a citizen of the United States over the age of twenty-one years, on or about the 25th day of November, 1890, by means of five shafts sunk in the ground to a depth of not less than ten feet showing the said known lodes well defined in rock in place, located
46 thereon the Clipper, Congress, Capital, Acme and Villa Lode mining claims by a full compliance with the miners' regulations of said district, the statutes of the United States and of the State of Colorado, and caused the boundaries thereof to be marked by substantial posts set in the ground in strict compliance with the law and said regulations, and thereafter and on, to-wit, the same day, filed their location certificates thereto with the county clerk and recorder of Lake county, Colorado, giving the names of the locators, the names of the claims and a sufficient description of the said claims by metes and bounds; that ever since said date the defendant company and its grantors have complied with the law in the doing of assessment work thereon and have been in full, undisturbed and complete enjoyment of said lode claims and of said known lodes.

VI.

And for a further and separate defense the defendant says that it is now the owner of and in the undisturbed possession of the Clipper, Congress, Capital, Acme and Villa Lode claims situate in the California mining district, county of Lake and State of Colorado; that said locations were made on or about the 25th day of November, A. D. 1890, by the grantors of this company, each being then and there a citizen of the United States over the age of twenty-one years, who discovered within the limits of each of the above named five claims a well-defined lode, ledge or vein of mineral in rock in place, and in each of said claims sunk a shaft thereon of not less than ten feet below the surface showing said lode, caused a discovery stake to be placed on each of said claims at the several points of discovery thereof, fixed the boundaries
47 of said claims by substantial posts properly marked and caused the location certificate in and to said claims to be filed giving the name of the lode, the names of the locators, and the number of feet claimed on each side of the discovery shaft and described the claims and each of them by metes and bounds; that all of these acts and everything else necessary to a full compliance with the law were done in the proper manner as provided by statute and miners' regulations on or about the 25th day of November, A. D. 1890; that thereafter this defendant company made its application for a patent upon said lode claims in the land office of the United States at Leadville for the district in which said lode claims are situated; that thereafter and while said applications for patent were

pending the plaintiffs brought this their so-called adverse suit claiming the said lodes and the territory embraced in said locations as the property of the plaintiffs under and by virtue of their alleged ownership of a certain pretended placer claim called the Searl placer as is more properly described in their said complaint. The defendant company says that the several lodes and veins upon which its several claims are located are now each and all well known to exist within the pretended boundaries of said placer claim and were known to exist at the time of bringing this suit by the plaintiffs that they are now and ever since hitherto have been in the possession of the defendant company which has been engaged ever since their discovery and location in working and developing them and that the plaintiffs are not entitled either to the possession or ownership thereof under their said pretended placer and have never located or attempted to claim said veins by virtue of any lode locations.

48 Wherefore, the defendant company prays that the plaintiffs' cause of action be dismissed and that it be allowed to go hence with its costs in this behalf expended.

THOMAS, BRYANT & LEE,
*Attorneys for Defendant.*

STATE OF COLORADO, }
*County of Arapahoe,* } *ss:*

H. H. Lee being first duly sworn upon his oath deposes and says, that he is one of the attorneys for the defendant company in the above entitled cause, that he has read the foregoing answer and knows the contents thereof and that the things therein contained are true to the best of his knowledge and belief, except those things stated upon information and belief, as to which he believes it to be true.

—— ——.

Subscribed and sworn to before me this — day of February, A. D. 1896.

My commission expires —.

——— ———,
*Notary Public.*

The above answer, or the original answer was filed in the District court of Lake county, State of Colorado Feb'y 6th, 1896.

49 STATE OF COLORADO, } ss:
*County of Lake,* }

In the District Court.

THE ELI MINING AND LAND COMPANY, a Corporation; A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
*vs.*
THE CLIPPER MINING COMPANY, a Corporation, Defendant.

Now comes the plaintiffs in the above entitled action and demur to the second defense set forth in the answer of the defendant herein and for cause of demurrer allege:

1. That the same does not state facts sufficient to constitute a defense to the complaint in this action;

2. And demur to the third defense in said answer, beginning after the fourth line on the fifth page thereof, for the reason that the facts therein stated are not sufficient to constitute a defense to such action, and also demur to the same for the reason that this suit is brought in support of an adverse suit, and that the ground in controversy in this action is the Capitol, Clipper, Congress and Castle Lode mining claims and involves the title only to the ground therein described; and that there is another suit pending in this court between the plaintiffs herein and other parties concerning the title to the said pretended Villa and Acme Lode mining claims.

50 3. And demur to the fourth and separate defense set forth in the answer of defendants herein and for cause of demurrer allege: That the same does not state facts sufficient to constitute a defense to the complaint herein;

4. And demur to the fifth defense set forth in said answer for the reason that the same does not state facts sufficient to constitute a defense to the complaint of the plaintiffs herein;

5. And demur to the sixth defense set forth in said answer and for cause of demurrer allege that the facts therein stated do not constitute a defense to the complaint of the plaintiffs herein;

6. And for other good and sufficient reasons and because this suit is brought in support of an adverse claim adversing the alleged Capitol, Clipper, Congress and Castle Lode mining claims and the ground described in said alleged claims is the only ground in dispute in this action; and because the said pretended Villa and Acme Lode mining claims, the title to which is in dispute in another action pending in this court;

7. And for other good and sufficient reasons appearing upon the face of said answer.

JOHN A. EWING,
CHAS. CAVENDER,
*Attorney- for Plaintiffs.*

(Endorsement on the back:) Case No. 4580. In the district court of Lake county. The Eli Min. & Land Co. *et al. vs.* The Clipper Mining

Company. Demurrer. District court Lake county. Filed Feb'y 17th, 1896. Jno. H. Dunn, clerk. By James J. Connell, deputy. John A. Ewing, Chas. Cavender, att'ys for pl'ffs.

51 STATE OF COLORADO, } ss:
*County of Lake,* }

In the District Court.

THE ELI MINING & LAND COMPANY ET AL., *Defendants,*
*vs.*
THE CLIPPER MINING COMPANY, Defendant.

Comes now the above named defendant, by its attorneys, and amending its answer heretofore filed, alleges that in all places in said answer where the lode mining claims of the defendant are referred to said answer is made to read six lode mining claims, known respectively as the Clipper, Congress, Capital, Castle, Villa and Acme.

THOMAS, BRYANT & LEE,
*Attorneys for Defendant.*

Original amendment to answer filed Feb'y 12th, 1896.

52 STATE OF COLORADO, } ss:
*County of Lake,* }

In the District Court.

THE ELI MINING & LAND COMPANY, Plaintiff,
*vs.*
THE CLIPPER MINING COMPANY, Defendant.
} Case No. 4580. Demurrer.

Comes now the above named plaintiff and moves the court to strike from the files the so-called amendment to the answer of the defendant herein, which was filed on February 12th, 1896, for the reason that said amendment was filed without leave of court being first had and obtained, and because the same is ambiguous and insufficient to raise any issue whatsoever.

JOHN A. EWING,
*Attorney for Plaintiff.*

(Endorsement on the back :) Case No. 4580. In dist. court. The Eli Min. & Land Co. *vs.* The Clipper Min. Co. Motion. District court Lake county. Filed Feb. 26, 1897. Jno. H. Dunn clerk, per —— —— deputy. J. A. Ewing, att'y for pl'ff.

53 STATE OF COLORADO, } ss:
*County of Lake,* }

In the District Court.

THE ELI MINING & LAND COMPANY, a Corporation; A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
*vs.*
THE CLIPPER MINING COMPANY, a Corporation, Defendant.
} Case No. 4580. Reply.

Come now the plaintiffs in the above entitled action and file this their reply to the new matter set up in the answer of the defendant, The Clipper Mining Company, and for reply to the second and further defense therein contained,

1. Admit that on or about the 14th day of December, A. D. 1877, the grantors of the plaintiffs herein were desirous of obtaining title to certain valuable ground situate near where the city of Leadville now stands, but allege the fact to be that at said time there was no town near the said ground described in the complaint herein;

2. Deny that said or any ground described in the complaint herein or sued for in this action was known by the said parties, or either or any of them, to contain valuable mineral deposits of the character which is commonly known as lode deposits, and deny that the grantors of the plaintiffs herein, or either or any of them, knew or could know at said time that the said ground described in the
54 complaint herein, or any part or portion thereof, contained any lode or lodes whatsoever or contained mineral deposits of the character which is commonly or otherwise known as lode deposits, and deny that they further knew that said ground would some time or at any time be valuable as town lots by reason of its proximity to the city of Leadville;

3. Deny that the said grantors of the plaintiffs herein, or either or any of them, devised a fraudulent or any scheme or conspiracy in and by which they, or either or any of them, determined to take up said land or any land as a placer mining claim, or that they well knew or knew at all that the same was not ground that could be worked as a placer mine or knew that it was not ground which was valuable for placer mining purposes;

4. Deny that, in pursuance of said scheme or any scheme or conspiracy whatsoever, they did locate or attempt to locate upon said ground or upon the ground described in the complaint herein;

5. Admit that they thereafter filed an application with the officers of the United States land office, located at Leadville in the county of Lake and district of Colorado, for a patent to said ground, and admit that their said application for a patent was contested;

6. Admit that one of the grounds of said contest was that said placer claim was fraudulent and that said ground was never placer ground; but deny that any ground of said protest was, or that said

application was contested on the ground, that said premises were valuable only for the lodes therein contained;

55 7. Admit that one of the grounds of contest was that said ground was valuable for town site purposes, and allege the fact to be that a hearing was had by the United States land office and it was decided that the said ground was not valuable for town-site purposes, and further, it was decided by the said land department that the said ground was mineral land; but deny that it was ever decided or held that said ground was valuable only for lode claims contained therein or for lodes therein contained;

8. Admit that a hearing was had upon said contest before the officers of the United States land office at Leadville, Colorado; but deny that after a full hearing, or any hearing that was fair, impartial or honest, said officers decided that said contest was well founded or that the applicants for a patent to said ground as placer ground were not entitled thereto because said ground was not placer ground or that said ground was not placer ground or could not be taken up as placer mining claims under the laws of the United States, or that the same was not subject to entry under said laws as a placer mining claim, or that said ground was valuable only for the lode claims which it contained, or that the same was valuable only for town-site purposes; but allege the fact to be that at the time of said hearing there was a great prejudice existing among certain persons in and near the city of Leadville against these plaintiffs and their grantors, said prejudice being based largely upon the fact that a large number of such persons sought to locate upon and build houses upon and obtain title to the ground in controversy in this action and the

56 ground contained in said placer claim, and that such being the fact, at said hearing before the said United States land office by false and perjured testimony of many persons who had an interest therein and by a fraudulent collusion between said persons and certain agents of the Government of the United States and the said register and receiver of the United States land office at Leadville, Colorado, the said United States land officers were induced to, and did, fraudulently, wrongfully and unlawfully and without any right whatsoever and in violation of the rights of these plaintiffs and their grantors, hold that said false, perjured and fraudulent testimony heard before them was true, and did also hold that said ground had not been shown to be placer ground at that time and had not been sufficiently improved to entitle said party to a patent at that time, all of which alleged facts so held by the said register and receiver of the United States land office were held by them fraudulently, dishonestly and corruptly and against the rights of these plaintiffs and their grantors, the said register and receiver well knowing at said time that the findings made by them were false, fraudulent, corruptly made and untrue, and that by reason of the facts aforesaid and the said fraud on the part of said register and receiver and on the part of certain persons colluding with them and certain persons as agents of the Government of the United

States, who were bribed, as these plaintiffs are informed and believe and so charge the fact to be, to make false reports as to the condition of said land, a ruling was had by the said register and receiver in which it was held that said ground had not been proven at
57 that time to be placer ground and that the plaintiffs herein and their grantors had not done sufficient work thereon at that time in order to obtain a patent, and for that reason and for no other the said land department refused to enter the same as a placer mining claim;

9. Admit that the grantors of the plaintiffs herein appealed to the Commissioner of the General Land Office at Washington, D. C., but deny that there was a full hearing had before the said Commissioner of the General Land Office at Washington, and allege the fact to be that the said Commissioner of the General Land Office, acting under false reports made to him by certain agents of the Government of the United States, who were sent to investigate the same and who had been influenced by certain persons in Leadville, and not having the witnesses before him, affirmed the said fraudulent decision of the said register and receiver.

10. Admit that the same was passed upon by the Secretary of the Interior on the 13th day of November, A. D. 1890, and allege that the said Secretary of the Interior, not knowing of said fraud and fraudulent practices, affirmed said decision; but deny that by reason of the facts aforesaid the Government of the United States, by its officers, has fully or otherwise adjudicated or determined the fact to be that the land described in the complaint herein, or concerning which this suit is brought, is not ground that can be taken up as a placer mining claim, and deny that any attempted entry or
58 any entry of the same as placer mining ground is void or of no effect, and deny that said Land Department has expressly or otherwise determined that the title set up in the complaint as claimed by the grantors of the plaintiffs herein was or is void or of no effect, and deny that the same has been cancelled or held for naught by the proper or any officers of the United States, and deny that by reason of said alleged fact or any fact, these plaintiffs have no right to set up their title herein as against the defendant herein or any one else;

11. Answering the third paragraph, or defense, set up in said answer of the defendant herein, beginning on the 5th page of said answer and ending near the middle of the 6th page thereof, these plaintiffs deny each and every allegation therein contained.

12. Answering the fourth paragraph of said answer of the defendant herein, beginning on the 6th page thereof and entitled "for a further and separate defense," these plaintiffs admit that on or about the 10th day of November, A. D. 1882, A. D. Searl, being the owner of the Searl placer as described in the complaint herein made his amended application for a patent to the same, it being amended survey No. 435, in the United States land office at Leadville, Colorado;

13. Admit that said amended application for patent was there-

after by the register and receiver of the said United States land office at Leadville, Colorado, rejected and cancelled, but deny that it was rejected and cancelled for the reason that the territory therein embraced was not placer ground or subject to location as such, or because the said plaintiff, A. D. Searl, and his grantors had
59 not complied with the law in making said placer location; but allege the fact to be that said alleged rejection and cancellation was made because it was claimed by the said register and receiver of the United States land office at Leadville, Colorado, that the requirements of the statute had not been at that time fully complied with, with reference to improvements made thereon in order to entitle the said A. D. Searl to a patent;

14. Allege that said register and receiver of the said United States land office rejected and refused to receive said application of the said A. D. Searl for the reason that they were prejudiced and biased against the said A. D. Searl and had been induced by numerous persons, who sought to obtain title to the said ground and who had built houses thereon, to reject said application; that the said register and receiver fraudulently and without any right and in violation of the evidence introduced before them and in violation of the law and by a wrongful and fraudulent pretended finding of facts and by pretending to find facts that did not exist, rejected said application;

15. Admit that the said A. D. Searl appealed from the said wrongful decision of the register and receiver to the Commissioner of the General Land Office who reviewed said testimony and without hearing further testimony and without being fully advised as to the fraudulent character of the decision of the said register and receiver and being influenced thereto by certain bribed agents of the Government of the United States, affirmed the said wrong-
60 ful decision of the register and receiver of the United States land office at Leadville, Colorado, on the 6th day of March, A. D. 1886; but deny that the said Commissioner of the General Land Office affirmed the same after a full or any legal hearing thereon;

16. Admit that the said A. D. Searl thereafter appealed from said pretended decision of the Commissioner of the General Land Office to the Secretary of the Interior of the United States and that thereafter the Secretary of the Interior affirmed and upheld the wrongful decision of the register and receiver and the wrongful decision of the said Commissioner; but allege that he upheld the same without knowing of the fraudulent decision and of the false and fraudulent findings made by the said register and receiver;

17. Deny that by said decision of the Secretary of the Interior or by the or any decision of the Commissioner of the General Land Office or by the said wrongful decision and the false and fraudulent findings made by the register and receiver of the United States land office at Leadville, Colorado or by any decision whatever, the said location of the said Searl placer, as set forth in the complaint herein, was wholly or at all cancelled or set aside or for naught held, or that by any decision whatsoever the same became, was or is wholly or other-

wise unappropriated public domain so far as the rights or claim of title of the plaintiffs and their grantors herein are concerned or otherwise and deny that the same was not subject to placer location, and deny
61 that the said register and receiver or the Commissioner of the General Land Office or the Secretary of the Interior of the United States or any constituted authority of the United States ever so held or so decided; but allege that the decision made by the Land Department was that the said plaintiffs herein and their grantors or the said A. D. Searl had not complied with the law sufficiently to entitle them to a patent at the time said application was made and that it had not been shown by the evidence adduced at that time that the said ground was distinctly valuable for placer purposes, and allege that no decision whatever was ever made in or by which it was decided, determined or adjudicated in any manner whatsoever that the said location of the Searl placer claim or the ground in the complaint herein described as the Searl placer was not properly located or was not placer ground;

18. Deny each and every other allegation contained in said 4th paragraph and further defense of said answer of the defendant herein not herein specifically admitted.

Answering the fifth paragraph of said answer beginning on page 8 thereof, these plaintiffs admit that on or about the 10th day of November, A. D. 1882, the plaintiff herein, A. D. Searl, made his amended application for patent to the ground described in the complaint herein as the Searl placer, the same being amended survey No. 435, but deny each and every other allegation contained in said fifth paragraph of said answer.

20. Answering the sixth paragraph of said answer of the defendant herein, these plaintiffs deny each and every allegation therein contained, except the allegation that these plaintiffs brought
62 their adverse suit against the said defendant herein.

Wherefore, plaintiffs pray judgment as prayed for in the complaint.

JOHN A. EWING,
*Attorney for Plaintiffs.*

STATE OF COLORADO, }
*County of Lake,* } ss:

A. D. Searl, being first duly sworn on his oath deposes and says: That he is one of the plaintiffs in the above entitled cause; that he has read the above and foregoing reply to the new matter set up in the answer of the defendant herein; that the matters and things therein contained are true of his own knowledge, except those matters therein stated on information and belief and as to those he believes them to be true.

A. D. SEARL.

Subscribed and sworn to before me this 6th day of November A. D. 1897.

A. TREGO,
*Notary Public.*

[SEAL.]

Original reply filed Nov. 8th, 1897.

5—76

63 STATE OF COLORADO, } ss:
*County of Lake,* }

In the District Court.

THE ELI MINING & LAND COMPANY, A. D. SEARL, F. C. SCHROEDER, A. F. Britton, and H. J. Gray, Plaintiffs,
*vs.*
THE CLIPPER MINING COMPANY, Defendant.

Comes now the above named defendant, The Clipper Mining Company, by its attorneys, Thomas, Bryant & Lee, and represents unto the court that the above entitled cause is an adverse suit heretofore begun between these plaintiffs and the Clipper Mining Company, No. 4580, for the purpose of establishing plaintiffs' prior right and title to what is known as the Searle placer as against certain lode mining claims duly located by these defendants as is more fully and particularly set forth in the pleadings of the parties on file in said cause.

Your petitioner further says that the legality and validity of the plaintiffs' title to the so-called Searle placer will be an important issue in the trial and determination of said cause and that the Honorable Frank Owers, the district judge within and for the aforesaid district in which said cause is pending and before whom the same would probably come for trial, was attorney for the plaintiffs, or one or more of them, and counseled and advised them in matters and things affecting the validity of the so-called Searle Placer in certain proceedings heretofore had in the several land
64 departments of the United States Government in which the said plaintiffs or one or more of them were applicants for patent from the Government of the United States to the said placer, and that by reason of such facts the said the Honorable Frank Owers would be prejudiced against this defendant and would be an improper person to sit as judge in the trial and hearing of said cause.

Wherefore your petitioner respectfully asks that a change of venue may be granted to it of said cause and that the same be removed to some other court of proper jurisdiction to be heard, tried and determined.

All of which is respectfully prayed for.

THOMAS, BRYANT & LEE,
*Att'ys for Defendant.*

(Endorsement on the back:) 4580 District court Lake county The Eli M. & L. Co. *et al. vs.* The Clipper Mg. Cos. Petition — change of venue District court Lake county Filed Nov. 6 1897 Jno. H. Dunn clerk, per —— —— deputy. Thomas, Bryant & Lee, attorneys for def't.

65 STATE OF COLORADO, } ss:
*County of Lake,* }

THE ELI MINING AND LAND COMPANY, A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
*vs.*
THE CLIPPER MINING COMPANY, Defendants.
} Affidavit of S. M. Carleton.

S. M. Carleton being first duly sworn deposes and says that he is the manager of the said The Clipper Mining Company, and that he acts in behalf of said company and is interested in the result of the above action by reason of his official connection therewith;

That he is informed and believes and upon this information and belief states the fact to be that the present judge of the fifth judicial district, the Hon. Frank W. Owers, has been for years past the legal counsellor, adviser and attorney for the said A. D. Searl, and the said The Eli Mining and Land Company in all matters requiring legal attention and especially in a certain action entitled to-wit; The Eli Mining and Land Company *vs.* The Clipper Mining Company, the same being known as case No. 4580, the complaint in which was filed on the 23rd day of November, 1893. And that in the said suit the judge of said fifth judicial district court appears as attorney for the plaintiff; and that the parties thereto and the issues involved are identical and similar with the parties and issues involved in this action; that he believes the said judge of said fifth judicial district is by law disqualified from trying the above
66 entitled cause and that justice and equity require that the said action be transferred to some other judicial district and tried before some other judge.

S. M. CARLETON.

STATE OF COLORADO, } ss:
*County of Lake,* }

Subscribed and sworn to before me this 6th day of October, A. D. 1897.

FRANK E. MERCEREAU,
[NOTARIAL SEAL.] *Notary Public.*

My commission expires July 20, 1899.

(Endorsement on the back:) No. 4580 The Eli Mining & Land Co. *et al. vs.* The Clipper Mining Co. Affidavit District court Lake county. Filed Nov. 6, 1897. Jno. H. Dunn clerk, per —— —— deputy. Thomas, Bryant & Lee, defendant's attorneys.

67 STATE OF COLORADO, } ss:
*County of Lake,* }

In the District Court.

THE ELI MINING AND LAND CO., A. D. SEARL, F. C. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
*vs.*
THE CLIPPER MINING COMPANY, Defendant.
} No. 4580. Notice.

To the above named plaintiffs and J. A. Ewing, their attorney:

Please take notice that a motion has been filed in the above entitled cause and court for judgment against you upon the pleadings filed in this cause, for the reasons stated in said motion, a copy of which is hereto attached:

And that upon the 31st day of January A. D. 1898 at ten o'clock in the forenoon or as soon thereafter as counsel can be heard at the district court room in said county, said motion will be called up for hearing and determination.

THOMAS, BRYANT & LEE,
*Defendant's Attorneys.*

Received a copy of the above notice together with a copy of the motion hereto attached this 29th day of Jan. A. D. 1898.

68 STATE OF COLORADO, } ss:
*County of Lake,* }

In the District Court.

THE ELI MINING AND LAND CO., A. D. SEARL, F. C. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
*vs.*
THE CLIPPER MINING CO., Defendant.
} No. 4580. Motion.

Comes now the above named defendant and moves the court herein for judgment against the plaintiffs on the pleadings filed in this cause, for the following reasons:

1. There is no denial by the plaintiffs of the new matter set up by way of defense in defendant's answer;

2. Because plaintiffs' replication does not state facts sufficient to constitute a defense to the new matter and defenses set up in defendant's answer;

3. Because said replication is sham, frivolous and irrelevant, and for other good and sufficient reasons appearing on the face of said pleadings.

THOMAS, BRYANT & LEE,
*Defendant's Attorneys.*

STATE OF COLORADO, } ss:
*County of Lake,* }

R. D. McLeod, being first duly sworn deposes and says that he is over the age of 21 years, that he is not interested in nor a
69 party to this action, that he served the annexed motion and notice upon the said attorney for the plaintiffs, Mr. J. A. Ewing, by delivering to and leaving with the said J. A. Ewing, personally, at his office in Leadville, a true copy of said motion and notice, upon the 29th day of January, A. D. 1898.

R. D. McLEOD.

Subscribed and sworn to before me this 31st day of January, A. D. 1898.

[OFFICIAL SEAL.] JNO. H. DUNN,
*Clerk Dist. Court,*
By JAMES J. CONNELL, *Deputy.*

(Endorsement on the back:) No. 4580 The Eli Mining & Land Co. *vs.* The Clipper Mining Co. Motion and notice District court Lake county Filed Jan. 31, 1898 Jno. H. Dunn clerk, per James J. Connell deputy. Thomas, Bryant & Lee, defendant's attorneys.

70 STATE OF COLORADO, } ss:
*County of Lake,* }

I, John H. Dunn, clerk of the district court of the fifth judicial district of the State of Colorado, held within and for the county of Lake, do hereby certify that the above and foregoing is a true, full and correct transcript of the record, summons, demurrer to complaint, demurrer to answer, motion to strike amendment to answer from files, petition and affidavit for change of venue, and motion for judgment on the pleadings, and the complaint in the therein entitled action, the same being numbered 4580 on the dockets of said court, and being the action of The Eli Mining & Land Company, a corporation, etc., A. D. Searl, F. C. Schroeder, A. F. Britton and H. J. Gray, plaintiffs, against The Clipper Mining Company, a corporation, etc., defendant, as the same now remains of record in my said office.

And I do hereby further certify that the answer, amendment thereto and reply have inexplicably been lost or mislaid, and that the copies hereto attached are true, perfect and complete copies of the office copies furnished by the attorneys in this litigation.

And I further certify that the bill of exceptions hereto attached is the bill of exceptions filed in this office.

Witness, my hand and the official seal of said court at Leadville, this 8th day of September, A. D. 1898.

[SEAL.] JOHN H. DUNN,
*Clerk District Court,*
By JAMES J. CONNELL, *Deputy.*

71 STATE OF COLORADO, } ss:
*County of Lake,* }

In the District Court.

THE ELI MINING & LAND COMPANY, a Corporation, &c.; A. D. Searl, F. C. Schroeder, A. T. Britton, and H. J. Gray, Plaintiffs,
*v.*
THE CLIPPER MINING COMPANY, a Corporation, &c., Defendant.
} No. 4580.

Be it remembered, that the above entitled cause came on for trial on the 25th day of April, A. D. 1898, before the court, a jury being expressly waived by both of said parties said trial was had to the court.

The plaintiffs to maintain the issues upon their behalf, had sworn as a witness J. B. Hall, who testifies that he had lived in Colorado since 1860. He was then asked about the location of the property described in the complaint as the Searl placer, whereupon the defendant, by its counsel, objected to any and all testimony concerning the location of said Searl placer, or the character of the ground covered thereby, or any testimony concerning the title claimed by the plaintiffs under said Searl placer location for the reason that under the issues of this case as made up the title had been declared invalid by the Land Office of the United States, and for the further reason that under the pleadings and the issues, said testimony was immaterial, irrelevant and incompetent.

72 But the said objection of the defendant was overruled, to which ruling of the court, defendant, by its counsel, then and there saved an exception.

Thereupon the said witness testified as to locating the Searl placer, in December, 1877; that he was one of the locators; that said ground was placer ground: that himself and the other locators were citizens of the United States; that the assessment work, the marking of the boundaries, the filing of the location certificate and other acts required by the law of the State of Colorado and of the United States at that time concerning the location of a placer mining claim were fully complied with.

C. G. Arnold, A. D. Searl, Robert B. Estey, A. D. Searl, Jr., L. O. House, Joseph W. Dilks, W. R. Macomb and Jesse F. McDonald were then sworn in evidence on behalf of the plaintiffs and did testify substantially as the witness Hall had testifies concerning the ground covered by the said Searl placer being placer mining ground, concerning the marking of the boundaries and also that work annually amounting to $100 had been done from 1877 down to the bringing of the suit, and also from that time to the trial of this cause, and the plaintiffs proved all the necessary acts necessary to make a valid placer location.

The plaintiffs also had sworn as a witness Jesse F. McDonald who

in addition to the other testimony above mentioned introduced a map which he had prepared and which he swore was correctly made showing the location of said placer and other claims, and said map is hereto attached and marked Exhibit No. 1.

73 The plaintiffs then introduced in evidence deeds and conveyances which duly conveyed the title originally acquired by said placer location to the plaintiffs in this suit so far as the paper title is concerned, and thereupon the plaintiffs rested.

The defendant to maintain the issues upon its part then had sworn as witnesses John McNulty, A. C. Saltzman, Frank Fox, J. Lowney, Thomas J. Rinker, J. H. Reed, Duncan McClelland, Joseph Doyle, William Emery, Robert Berry and Timothy Kay. These witnesses testified that they had each examined, or watched others examine, the ground in question from two to three hours each or longer; that the surface of said ground was covered with wash or debris; that in washing or panning said ground only colors had been found; some of said witnesses testified that said ground was not placer ground, and in their opinion could not be made to pay as placer ground; others of said witnesses testified that they could not express an opinion as to whether said ground was placer ground or not; and the defendant also had sworn as witnesses J. W. Newell, Joseph Doyle and J. K. Carleton, who testified that they had been familiar with the ground since 1880, and that since that time valuable lode deposits had been discovered and known in the region in which this placer is located, and the said J. K. Carleton testified that he believed that there was one large mineral bearing vein which underlaid the whole of said placer, dipping under the same, that he knew of evidences of said vein extending under said placer from workings in the Lucy B. Hussey, and other lodes as far back as 1881; and said Newell, Doyle and Carleton testified that said lode or vein had, since 1895, been traced and

74 discovered under said placer. Said witnesses, together with S. M. Carleton also testified to the discovery and location of the Castle, Clipper, Congress, and Capital Lode mining claims; that said claims were located on the 25th of November, 1890; and said Carletons testified that at that time the said mineral bearing vein was known to underlie said placer; and said Newell testified that to his knowledge a valuable discovery of mineral in said lodes was made in 1895; and said three witnesses testified that said claims had all had work performed upon them in the shape of a shaft sunk to the said mineral bearing vein from which a great many thousand dollars worth of ore had been extracted and shipped to the smelter; that the discovery shafts had been sunk upon each of said claims, the boundaries had been marked, the location certificates had been prepared and filed as required by the statutes of the State of Colorado, and that the statutes of the said State and of the United States, relating to the discovery, location, recording and annual work upon each of said claims had been in all things fully complied with.

The defendant, S. M. Carleton, also identified a certain map showing the location of the ground in controversy, including the placer

claims and the lode claims in suit; which said map is hereto attached and marked Exhibit 2.

And thereupon the defendant offered in evidence a certified copy of the decision of the Commissioner of the General Land Office of the Secretary of the Interior and of the proceedings had thereon in the matter of the application of A. D. Searl for patent upon the said placer mentioned in the complaint herein and known as the Searl placer; which said papers were objected to by counsel for the
75 plaintiffs upon the ground that they were immaterial, incompetent and irrelevant, which said objection was by the court overruled, and said record was introduced in evidence, and was as follows, to wit:

Which said certified copy was in words and figures as follows to wit:

In the United States Land Office at Leadville, Colorado.

In the Matter of the Protest of MARK H. SEARS and Others against the Issuance of a Patent to A. D. Searl upon His Application for a United States Patent, No. 266, on Survey No. 435 of the Fairplay Land District, Colorado, Commonly Called the "A. D. Searl Placer."

To the register and receiver of the United States land office at Leadville, Colorado, and to the Hon. Commissioner of the General Land Office of the United States, at Washington, D. C.:

Your petitioner and protestant Mark H. Sears, who files this petition and protest as well for himself as for two hundred *bona fide* residents on what is known as United States survey No 435 of the Fairplay land district, Colorado, situate in California mining district, Lake county, Colorado.

Respectfully shows to your honors:

First. That himself and those for whom this petition and protest are filed are citizens of the United States, over the age of twenty-one years; that they are *bona fide* residents of the city of Leadville, Lake county, Colorado, and reside upon the ground embraced within
76 the boundaries of U. S. survey No. 435, for which said survey A. D. Searl has applied for a U. S. patent, claiming the same as a placer mining claim; that a partial list of the persons residing on said survey No. 435 is attached to and made a part of the affidavit of Enos S. Briggs filed herewith; that in the limited time which has been at the disposal of this protestant it has been impossible for him to obtain a full and complete list of the *bona fide* residents on said survey, but protestant is informed and verily believes that there are at least two hundred (200) such *bona fide* residents on said survey No. 435.

Second. That the land covered by said survey No. 435 lies in California mining district, Lake county, Colorado, and lies adjacent to and includes a portion of the city of Leadville, Lake county, Colorado.

Third. That such land was taken up and located in December,

A. D., 1877, by John Leahy *et al.* as a placer mining claim, as will be seen by reference to a certified copy of the location certificate of said claim filed herewith.

Fourth. That at the time of said pretended location and hitherto to this date the boundaries of said so-called placer claim were not and have not been marked and defined on the ground as the law requires.

Fifth. That on the 5th day of July, A. D., 1879, the applicant therein, A. D. Searl, filed in the United States land office at Leadville, Colorado, his application for a United States patent for said U. S. survey No. 435, claiming the same as a placer mining claim; said application being numbered 266, of the series of numbers
77 of said office; and that notice of said application was not posted on the ground during the time and in the manner required by the statutes of the United States.

Sixth. That neither the applicant, A. D. Searl, nor his grantors have expended upon the said survey No. 435 for placer mining purposes the sum of five hundred dollars.

Seventh. That the ground covered by said survey No. 435 is not properly placer mining ground, and has never been held and worked as such by the applicant or his grantors.

Eighth. That the said applicant A. D. Searl is not now and has not been, nor is or has any one been in the possession of said survey No. 435, or the land covered by said survey, as a placer mining claim.

Ninth. That said premises are almost entirely covered by mining survey of lode claims, and lie immediately adjacent to a well-defined system of lode mining claims, or lode deposits.

Tenth. That a large portion of the surface of the ground covered by said survey No. 435 is claimed and occupied by *bona fide* residents of the city of Leadville, who have erected thereon residences, stables and outbuildings, the aggregate value of which is not less than twenty five thousand dollars; the number and relative size and position of such residences, stables and out-buildings being correctly shown upon the plat herewith filed.

Eleventh. That the said applicant A. D. Searl has never intended, and does not intend, to work said premises as a placer mining claim; and in obtaining a patent for said premises his sole and only purpose is to speculate in said lands and distress the *bona fide* residents thereon, as said land is valuable for residence or municipal purposes only.

78 And in support of the allegations above set forth this protestant respectfully presents and shows to your honors the plat made by Charles J. Moore, a deputy U. S. mineral surveyor, and the affidavits of Charles J. Moore, J. W. Campbell, Marx Kahn, Simon Mooney and Enos S. Briggs, filed herewith and prayed to be made a part hereof.

Wherefore, your petitioner and protestant humbly prays;

That the application of said A. D. Searl for a United States patent on said survey No. 435 may be set aside and for naught held, and

that the said A. D. Searl may not be permitted to make entry of the land covered by said survey No. 435 as a placer mining claim.

(Signed) M. H. SEARS.

JOHN M. MAXWELL,
GEORGE S. PHELPS,
*Solicitors for Protestant.*

STATE OF COLORADO, }
*County of Lake,* } *ss:*

Mark H. Sears being duly sworn says: I have read the foregoing petition and protest and know the contents thereof, and the same is true of my own knowledge, except such matters as are therein stated upon information and belief, and as to those matters I verily believe the same to be true.

(Signed) M. H. SEARS.

Subscribed and sworn to before me this 13th day of December, A. D., 1882.

[SEAL.] (Signed) ABEL GOSS,
*Notary Public.*

79 Know all men by these presents, that we, the undersigned, have this 14th day of December, A. D., 1877, claimed by right of location under the laws of Congress and according to the local laws and regulations 157.02 acres of a placer claim situate in the California mining district, county of Lake, and State of Colorado, and described as follows, to wit:

Beginning at cor. No. 37 of survey No. 255: thence N. 2° E., 422.8 feet; thence N. 2° 35′ E., 440.5 feet; thence N. 10° 50′ E., 560.7 feet; thence N. 10° 37′ E., 845 feet; thence N. 32° 6′ E., 483 feet; thence N. 49° 13′ E., 155.5 feet; thence N. 78° 42′ E., 142 feet; thence S. 63° 38′ E., 260 feet; thence S. 77° E., 1841.4 feet; thence S. 12° W., 1420 feet; thence S. 13° W., 1420 feet; thence N. 77° E., 1841.4 feet; thence N. 75° 35′ W., 430.3 feet to the place of beginning, containing 157.02 acres of placer mining ground.

Variation on all courses 15° E.

| | |
|---|---|
| JOHN LEAHEY. | ANDREW BALDRIDGE. |
| THOMAS STARR. | F. H. EDWARDS. |
| DAVID FULTON. | JOHN CURRIE. |
| GEORGE YOUNG. | J. B. HALL. |

Recorded Dec. 24th, A. D., 1877, at 7 a. m., in Book 10, page 154.

STATE OF COLORADO, }
*County of Lake,* } *ss:*

I, J. W. Jacque, clerk and recorder in and for said county in the State aforesaid, do hereby certify that the *written* and foregoing is a true and correct copy of loc. cert. No. —, as appears of record in my office in Book E., page 261.

[SEAL.] Witness my hand and official seal this 13th day of Dec., A. D., 1882.

J. W. JACQUE,
*Clerk and Recorder, Deputy.*

80 In the United States Land Office at Leadville, Colorado.

In the Matter of the Protest of MARK H. SEARS and Others against the Issuance of a Patent to A. W. Searl upon His Application No. 266 on Survey No. 435 of the Fairplay Land District, Commonly Called the A. D. Searl Placer.

STATE OF COLORADO, } ss:
*County of Lake,* }

James W. Campbell, being first duly sworn, upon his oath deposes and says: I am a citizen of the United States, 29 years of age; I have resided in Leadville, Lake county, State of Colorado, for 2½ years; I know the so-called Searl placer mining claim, United States survey No. 435, situate in California mining district, Lake county, State of Colorado, and have resided on a portion of the same, during all the time that I have been in Leadville, with the exception of about one month; I have been superintendent of the Chrysolite mine, for the Chrysolite Mining Company, since the 15th day of December, A. D., 1880, and was timber foreman for said company prior to that time. Said Chrysolite mine, or rather the Chrysolite consolidation, embrace, among others, the Fairview, the All Right, Kit Carson, and Little Eva, cut out recently by amended placer survey of said Searl placer. I have had considerable experience in mining matters; I am thoroughly acquainted with the ground embraced in said so-called Searl placer since my residence thereon, and the ground embraced in said survey No. 435 lies adjacent to and includes a portion
81 of the east portion of the city of Leadville, Lake county, State aforesaid; and a number of the streets of said city are surveyed, laid out and dedicated to public use across said survey; the ground embraced in the plat (which I have been shown) representing the amended survey of said so-called Searl placer, is completely bounded on the east side thereof, and partially on the north side thereof, by lode claims, which are a part of a well known system of lode deposit. Some of said lodes are now yielding silver and lead bearing ores in paying quantities; said survey is near or in the vicinity of Big Evans gulch, which is the only natural water course or stream of water in the immediate neighborhood of said so-called placer claim; almost the entire body of water, from said Big Evans gulch, as this affiant has been informed and believes, is and has been appropriated by parties other than the placer claimant herein, so that it is impossible for said placer claimant to obtain any supply of water from that source for placer mining purposes; a ditch known as the "Starr ditch" runs across and along the western boundary

line of said survey No. 435, something less than 60 feet from said line; the water of said ditch is used by residents of Leadville for home purposes; and is also in placer mining work in California gulch, something near a mile from said survey No. 435.

The Arkansas river is the only source of water supply known to affiant, from which water could be brought on to the ground embraced in said so-called Searl placer in sufficient quantity to carry on placer mining; and the cost of bringing the same by ditch
82 and flume would be very large; the distance to the nearest point being something over eight miles.

In my opinion the cost of bringing water from that point would not be less than fifty thousand dollars; during the time I have resided in Leadville I have been over all the ground covered by said amended survey No. 435, and I have been over portions of it every day since I have resided in Leadville.

The general character of the ground embraced in said survey I should designate as a glacial deposit and wash; no timber remains upon the ground; though the stumps yet to be seen indicate that it was formerly covered with a growth of pine or spruce; there are within the boundary line of said survey perhaps two holes, which I should say were sunk for the purpose of prospecting the ground; they vary in depth from four to fifteen feet. I do not think that from these holes any determination whatever could be arrived at as to the value of said ground as placer ground, and none such bedrocks; there are several shafts embraced within or included within the boundaries of said amended survey.

These shafts were sunk by the owners of various lode claims located upon the ground covered by said amended survey, several of these shafts are used as wells. Besides the holes above mentioned there is a small ditch, less than 300—feet in length, it varies in depth from 8 to 16 inches.

This ditch is partially filled up by wash; it begins at the Stow ditch, and this ditch, such as it is, would not afford water sufficient for placer mining purposes, or any portion of said ground. I know of no placer improvements upon said ground, unless the prospect holes and ditch above referred to are claimed as such, and if
83 so claimed, I am satisfied from my experience and knowledge of such work, that the value of such work and improvements could not possibly exceed three hundred and fifty dollars.

I have never seen during my time of residence on a portion of said survey No. 435 any evidence whatever that the placer claimant herein, or any one for him, was in possession of said ground for placer mining purposes; and although I have been careful to note what has been done on said ground during the time I have resided thereon, I have never seen the placer claimant herein, or anyone for him, doing any placer work thereon, or working the same for placer purposes. The occupants of said ground are residents thereon, and there are upon the ground included in said amended survey some 300 residences and stables, all of which are a part of the city of Leadville, a large proportion of said buildings are pri-

vate residences, mainly frame and log buildings, and the rest are stables, except a large dairy barn.

In my opinion the ground included in said amended survey cannot be worked as placer ground by any known system of working said placer ground, as there are no discovered leads, lodes or ledges bearing gold on any lands or streams adjacent to said survey; and in my judgment gold in paying quantities does not exist in any of the ground covered by said amended survey No. 435; and it is my opinion from my knowledge of said ground, and the examinations I have made, that the ground included within the boundaries of said survey No. 435, is really valuable only for municipal
84 purposes, and for seats for towns and for residences.

(Signed) J. W. CAMPBELL.

Subscribed and sworn to before me this 13th day of December, A. D., 1882.

[SEAL.] T. L. BYRNE,
*Notary Public.*

In the United States Land Office at Leadville, Colorado.

In the Matter of the Protest of MARK H. SEARS and Others against the Issuance of a Patent to A. D. Searl upon His Application No. 266 on Survey No. 435 of the Fairplay Land District, Commonly Called the "A. D. Searl Placer."

STATE OF COLORADO, }
*County of Lake,* } *ss:*

Charles J. Moore, being duly sworn, upon his oath says: I am a citizen of the United States, 34 years of age; I have been a deputy United States mineral surveyor nearly four years, and during that time I have resided and practiced my profession in Leadville, Lake county, Colorado; and in connection with the prac-
85 tice of my profession I have had a large experience in examining and reporting on placer mining claims; I know the so-called Searl placer mining claim, United States survey, No. 435, situate in California mining district, Lake county, State of Colorado; I have known the ground embraced in said so-called Searl placer and survey since the spring of 1879. The ground embraced in said United States survey No. 435 lies adjacent to and includes a portion of the northeast portion of the city of Leadville, Lake county, Colorado, a number of the streets of said city having been surveyed, laid out and dedicated to public use across said survey No. 435. The ground embraced in the plat representing the amended survey of said so-called Searl placer, is completely bounded on the east side thereof, and partly on the north side thereof, by lode claims; and belonging to a well-known system of lode deposit and individual lodes. Some of said lodes are now producing silver and lead-bearing ores in large and paying quantities; said survey No. 435 is in

the vicinity of, but not on the immediate bottom, Big Evans gulch, which is the nearest natural water course or stream of water; no portion of the northern boundary line of said survey No. 435 is immediately adjacent to or comes to the bottom of said gulch; the northern boundary line thereof being on the second bench or bottom above said gulch. Almost the entire body of water of said Big Evans gulch is, and for a long time has been, appropriated by prior water claimants, so that no water whatever from that source could be obtained for placer mining purposes by the applicant in this case.

A ditch known as "the Starr ditch" runs along the western
86 boundary line of said survey No. 435, at a distance of from 20 to 50 feet from said boundary line, and on a lower level than said survey No. 435. The water in that ditch is used by the residents of the city of Leadville for domestic purposes, and for placer mining operations carried on in California gulch at least one mile distant from said survey No. 435 at its nearest point thereto.

The nearest point on the Arkansas river (which is the only other source of water supply) from which water could be brought to and upon said survey No. 435 in quantities sufficient to carry on placer mining operations on the same, is nine miles; and the cost of constructing a ditch, which would conduct sufficient water on said survey No. 435 for such purposes, would be not less than thirty-five thousand dollars.

The plat marked "Searl placer," filed with the protest in this case, and made a part thereof, certified by me, was made from actual surveys on the ground, which surveys were made between the 13th day of November, A. D., 1882, and the 5th day of December, A. D., 1882, by myself and two assistants. In making such surveys I thoroughly and carefully examined every part and portion of said ground covered by the amended survey No. 435; the general character of the ground covered by said survey is a glacial deposit and wash. There is no timber whatever on the ground; from the number of stumps remaining upon the ground it is evident that it was once covered with a thick growth of pine or spruce. There are within the boundaries of said survey No. 435 about one dozen holes varying in depth from 3 to 8½ feet, which I was informed were sunk by the placer claimant for the purpose of prospecting
87 such ground; none of these holes are of any value whatever to determine the economic value of said ground as placer ground, as none of them reach bed-rock. There are also within the boundaries of the amended survey seventeen shafts, varying in depth from three to three hundred and sixty feet—six by three feet in the clear, nearly all of which are well timbered. These shafts were sunk by the owners of various lode claims, located upon the ground covered by said amended survey; none of them were sunk by the placer claimant, or his grantors; seven of these last mentioned shafts are used as wells for domestic purposes.

The only geological formation shown by the development in these deep shafts, other than the glacial wash and drift already mentioned, is porphyry rock in place, which porphyry is certainly not the bed-

rock; none of these deep shafts having reached the bed-rock. The surface wash varies in depth but appears to be an average of 35 to 50 feet in depth as shown by a comparison of the different shafts mentioned above.

Other than the holes above mentioned, there is a short section of ditch claimed to have been dug by the placer claimant; the mean depth of this ditch is 18 inches to 2 feet, width of this ditch 3 feet; the total length of this ditch is 236 feet. This ditch is filled up by wash in three places, aggregating a length of about 80 feet, which is so filled up. The mouth of this ditch is at the Starr ditch about the middle of the block between Hazel and Alder streets on the north side of 14th street, as shown on the plat herewith filed. There is no such ditch on the ground as shown on the amended plat,
88 thorough search having been made therefor. The ditch as it actually exists on the ground would not afford sufficient water for working any portion of the ground included within the boundaries of the amended survey as placer grounds; with the exception of the prospect holes, and the section of ditch above described, there are no placer improvements or improvements for placer mining purposes whatever, included within the boundaries of the amended survey, and four hundred dollars will certainly cover all the work done or improvements made for placer mining purposes by the placer claimant.

The plat filed herewith shows a small ditch carrying water pumped from the ruins on Fryer hill, to brick-yards below the Starr ditch, and is there used for making brick; this ditch, however, is not claimed by the placer claimant as forming any part of the improvements for placer mining purposes.

There existed at the time of making the surveys for the plat no evidences whatever to show that the placer claimant herein, or any one for him, was in possession of said ground for placer mining purposes. The sole occupants of said ground are the *bona fide* residents thereon, and there are upon the ground included in said amended survey 312 residences and stables, and not including shaft houses, all of which are a portion of the city of Leadville.

The great majority of above buildings are private residences, mainly frame and log buildings; the rest of the buildings are stables with one exception—a dairy barn of large dimensions. The relative sizes and positions are correctly shown upon the plat filed herewith.

89 In my judgment the ground included within the boundaries of the amended survey No. 435, cannot possibly be worked or mined as placer ground by any known system of working placer ground. No gold-bearing leads, lodes or ledges have been discovered on any lands adjacent to, or any streams flowing near or adjacent to, said survey No. 435, so that it is very highly improbable that gold in paying quantities or in any quantity whatever exists upon or in the ground covered by said survey No. 435; and it is my opinion from my knowledge of said ground, and the examination I have made of the same, that the ground included within the

boundaries of said survey No. 435, is valuable only for municipal purposes, and for seats for towns and for residences; and further this affiant says that he is not interested in the application for patent upon survey No. 435, nor in this protest in any manner whatsoever.

(Signed) CHARLES J. MOORE.

Subscribed and sworn to before me this 14th day of December, A. D., 1892.

[SEAL.] (Signed) T. L. BYRNE,
*Notary Public.*

90 In the United States Land Office at Leadville, Colorado.

In the Matter of the Protest of MARK H. SEARS and Others against the Issuance of a Patent to A. D. Searl upon His Application No. 266 on Survey No. 435 of the Fairplay Land District, Colorado, Commonly Called the A. D. Searl Placer.

STATE OF COLORADO, }
*County of Lake,* } ss:

Enos S. Briggs, being duly sworn, upon his oath says: I am a citizen of the United States, thirty-two years of age; I am a miner and have been engaged as such for five years last past; I am, and have been for the past two years, a resident of Leadville, Lake county, Colorado; and for two years last past have known the ground covered by U. S. survey No. 435, known as the A. D. Searl placer claim, situate in California mining district, Lake county, Colorado: said ground lies adjacent to and forms a part of the northeast portion of the city of Leadville, the streets of said city of Leadville running upon and across a portion of said ground. I have frequently within the past two years been over said ground, and on the 11th day of December, A. D. 1882, I made a thorough and careful examination of every portion of the ground included within the boundaries of said survey No. 435. The paper attached to this affidavit marked "Exhibit A" is a full and correct list and statement of all the improvements and work done upon said
91 ground. The ditch mentioned on said list, and fifteen holes from three to ten feet deep, are the only improvements, if they can be called such, which have been placed upon said ground by the applicant herein; and the total cost of excavating said ditch and sinking said fifteen holes would not exceed two hundred dollars ($200.00)

The ditch above mentioned is entirely worthless for placer mining purposes, as it is filled up for about ninety feet of its length, and from its position—if it was in good order—it could not convey water upon any considerable portion of said ground. The holes mentioned in said list are of no value for placer mining purposes, as none of them reach bed-rock. The shafts mentioned on said list were sunk by the locators and claimants of lode mining claims, which have been abandoned, none of said shafts reach bed-rock,

and but one of them has reached solid foundation at a depth of more than two hundred feet. The foundation of the said ground, as shown by the various dumps at or near the shafts above mentioned, is a boulder wash, and appears to be from one hundred to two hundred feet deep. There is no water, except a small quantity of surface water, upon said claim; and the nearest point from which water could be brought upon said ground, in quantity sufficient to carry on placer mining operations, is the Arkansas river, at a point at least ten miles from said ground.

There is no timber on said ground. No placer mining operations whatever have been carried on upon said ground within the last two years, neither is the applicant or any one for him in possession of said ground for placer mining purposes. From my knowledge of the ground, and examination of it, I am of the opinion that
92 said ground is valuable only for municipal or residence purposes; and there are now upon said ground in the neighborhood of two hundred *bona fide* residents upon said ground, a partial list of whom is hereto attached marked "Exhibit B;" and there are within the boundaries of said survey No. 435 in the neighborhood of three hundred buildings, the residences and stables of said *bona fide* residents.

(Signed) ENOS S. BRIGGS.

Subscribed and sworn to before me this 14th day of December, A. D., 1882.

[SEAL.] (Signed) T. L. BYRNE,
*Notary Public.*

"EXHIBIT A."

Ditch about 240 ft. long, from 1 to 1½ ft. deep, and 2 to 2½ ft. wide, its end 75 to 80 ft. from Starr ditch, filled up from 75 to 90 ft.

Holes and shafts.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 1 | S. | side of | R. R. track | 4 | ft. deep— | 15th | St. |
| 2 | " | " | " | 5 | " | 15 | " |
| 3 | N. | " | " | 5 | " | 16 | " |
| 4 | " | " | " | 4 | " | 16 | " |
| 5 | S. | " | " | 6 | " | 16 | " |
| 6 | " | " | " | 10 | " | 16 | " |
| 7 | " | " | " | 10 | " | 16 | " |
| 8 | N. | " | " | 10 | " | 16 | " |
| 9 | N. | " | " | 10 | " | 16 | " |

93

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 10 | N. | side of | R. R. track | 30 | ft. timbered— | 16th | St. |
| 11 | S. | " | " | 40 | " timb'd., caved in, | 16th | St. |
| 12 | S. | " | " | 10 | " | 16th | St. |
| 13 | S. | " | " | 20 | " " | 16 | " |
| 14 | S. | " | " | 100 to 200 ft. timb'd., known as "Oregon | | | |

7—76

Boy;" perhaps this wash, iron stain, porphyry and blue print sunk for lode purposes.

15 S. side of R. R. track 40 ft. timb'd.
16 S. " " 3 "
17 S. " " 25 " timb'd.
18 S. " " 45 " "
19 S. " " 38 " "
20 S. " " 45 " " —Zulu lode.
21 S. " " 5 " bet. 12 & 13 St.
22 S. " " 5 " " " "
23 S. " " 5 " " 11 & 12 St.

24 S. side R. R. track shaft timb'd., 55 ft. deep, now used as a well, bet. 11 & 12, head of Orange St.

25 S. side of R. R. track 50 ft. deep timb'd., bet. Alder & Orange on 11th.

26 "Kelly Bros. lode," shaft 112 ft. timb'd. shaft house.

B. & S. 27 (1) Shaft near road turning toward smelter 20 ft. deep, timb'd. on Tamson lode. Shaft 35 E. of (1) 75 ft. deep timb'd. on Tamson lode.

Tamson Lode shaft proper (could'd. measure cov'd. by shaft-house locked up)

Shaft 30 ft. S. of shaft-house 6 ft. deep on Tamson L. Shaft 94 25 ft. south of shaft-house 30 ft. deep, timb'd.

28 Shaft on 12th St., 50 ft. deep, timb'd.
29 " " 9th St., 85 ft. " "
30 " " " " 40 ft. " "
31 " " " " 35 ft. " "
32 " " " " 60 ft. " " now used as a well.

"EXHIBIT B."

*Names of Parties Living on "Searl Placer."*

Eighth street.

1 William Wetherell,
2 John Gregory,
3 Henry Moore,
4 W. S. Neal,
5 Mrs. McCloud,
6 Moses Coll,
7 Joseph Normington,
8 Charles Byers.

Ninth street.

9 Rob't Sculley,
10 P. Doyle,
11 John Andres,
12 Mrs. Claugherty,
13 James Seigfried,

95
14 Geo. Klock,
15 Thos. Simpson,
16 J. A. Hebbard,
17 William Henchliff,
18 L. C. Scott,
19 George Mussellmann,
20 Charles Reiger,
21 Fred Cadwell,
22 Asia Crow,
23 Frank Elliot,
24 William Weir,
25 William Davis,
26 James Uren,
27 Enos S. Briggs,
28 A. W. Duggan,
29 Howard Chapan,
30 Charles Mayham,
31 J. A. Green,
32 C. Z. Green,
33 G. O. Worrell,
34 John Daum.

Tenth street.

35 J. E. Gallagher,
36 C. Fields,
37 C. H. Jones,
38 S. L. Randall,
39 Wells Brown,
96
40 P. Neal,
41 C. Streb,
42 Walter Donehue,
43 A. F. Abbott,
44 Mrs. Dimick,
45 Henry Girkin,
46 John Lynch,
47 Mrs. Sheriff,
48 W. C. Parker,
49 W. C. Teft,
50 B. B. Gransberry,
51 Harry Berry,
52 H. C. Francis,
53 M. H. Sears,
54 Alfred Seabrook,
55 Joseph Brokenshire,
56 Thomas Cully,
57 W. E. Moses,
58 E. Mooney,
59 Thos. Gleason,
60 A. L. Ellis,
61 Mark Drummand

105 Mr. Fritz,
106 Marx Kahn,
107 Messrs. Kelly Bros.
108 Havens & Beman,
109 J. W. Christy,
110 Mrs. Hutchinson—9th
111 C. C. Rulinson—9th
112 Frank Marton

62 L. P. Hanson,
63 M. Crissman,
64 E. E. Tinsdale,
65 J. H. Roberts,
97 66 Able Goss,
67 Olef Nellson,
68 H. C. Dimick,
69 J. W. Campbell,
70 J. H. Hinby,
71 John Moore,—11th St.
72 John Brado,
73 William Lewis,
74 E. J. White,
75 M. Labell,
76 A. A. Anson,
77 J. R. Kinzy,
78 John Freshbrook,
79 C. Metcalf,
80 Alfred Meginity.
81 Henry Rider,
82 Geo. Robinson,
83 E. Cadwell,
84 John Otter,
85 D. W. Davis,
86 William Booco,
87 Samuel Burnsides,
88 John G. Howard,
89 M. A. Bunker,

98 Twelfth street.

90 James Scanlan,
91 David Noble,
92 John Vasser,
93 James Hensley,
94 Sylas Brown,
95 Mrs. Thomas,
96 S. F. Earl,
97 Thomas Trent,
98 Edward Stanton,
99 Mrs. Hanna,
100 B. F. Warfield,
101 Thomas Guddick,
102 Newton Graham,
103 Joseph Kretchler,
104 J. H. Clute,

Renters—Eighth street.

Mrs. F. L. Cole,
Edw'd Bennett,
James Quinn,
C. A. Underwood,

Ninth street.

Thos. Tait,
John Marfeil,
H. C. Corwin,

99 Eleventh street.

James Kavanaugh,
John McDonald,
W. W. Dickey,
F. C. Miller,
Isaac Walton,
G. S. Davis,
Frank Henskell,
W. H. Lovell,
Geo. Wirth.

100 In the United States Land Office at Leadville, Colorado.

In the Matter of the Protest of MARK H. SEARS and Others against the Issuance of a Patent to A. D. Searl upon His Application No. 266 on Survey No. 435 of the Fairplay Land District, Commonly Called the "A. D. Searl Placer."

STATE OF COLORADO, } ss:
*County of Lake,* }

Simon Mooney, being duly sworn, upon his oath says: I am a citizen of the United States, forty-four years of age; I am now and for three years last past I have been a resident of Leadville, Lake county, Colorado, and during that time I have known the ground covered by what is known as the "Searl placer," it being U. S. survey No. 435, situate in California mining district, Lake county, Colorado; said Searl placer lies adjacent to and forms a part of the northeast portion of the city of Leadville, and adjoins Freyer hill on the west. I have been over the ground covered by said placer a
101 number of times, and am well acquainted with the location and character of the ground included within the boundaries of said Searl placer.

On the 11th day of December, A. D., 1882, I made a careful and thorough examination of said ground for the purpose of determining the character and extent of the work which had been done, and the improvements made upon said ground by the applicant for patent herein, and any other person or persons. Upon such examination I found fifteen holes from three feet to ten feet deep in the wash, none of which are timbered and none of which are of any value whatever for placer mining purposes. I also found twenty-one shafts varying in depth from twenty to over two hundred feet deep; most of which are timbered, and judging from appearances these shafts were sunk by the owners and claimants of lode mining claims which have been abandoned. None of these shafts have reached

the bed-rock as shown by the dumps at the shafts. Upon this examination I also found a ditch taken from the Starr ditch, which runs near the western boundary of said placer claim; this ditch is about two hundred and forty feet long from twelve to eighteen inches deep, and from twenty-four to thirty inches wide, and is completely closed up for about seventy-five feet of its length; and is of no value whatever for placer mining purposes. The cost of constructing this ditch could not exceed fifty dollars and the cost of sinking the fifteen holes above mentioned could not exceed two hundred dollars ($200.00).

There is no water whatever except surface water upon the claims, and the only source of supply from which water could be
102 obtained in sufficient quantity to carry on placer mining operations upon said ground is the Arkansas river at a point at least ten miles distant; and the cost of constructing a ditch from such point with a capacity sufficient to conduct water upon said ground for placer mining purposes would be very great. Since I have known the ground within the boundaries of said Searl placer there have been no placer mining operations whatever conducted or carried on upon said ground by the applicant for patent herein or by any one else.

From my knowledge of the ground and from the examination of it, which I have made, I am of the opinion that said ground is not valuable for placer mining purposes, and is only valuable for municipal purposes; there being at the present time not less than —— *bona fide* residents upon said ground, many of whom have resided there for the past four years.

(Signed) SIMON MOONEY.

Subscribed and sworn to before me this 12th day of December, A. D. 1882.

[SEAL.] (Signed) T. L. BYRNE,
*Notary Public.*

STATE OF COLORADO, }
*County of Lake,* } *ss:*

Marx Kahn, being duly sworn, upon his oath says: I am a citizen of the United States, fifty-two years of age; I am, and
103 for nearly three years last past have been, a resident of Leadville, Lake county, Colorado; and for two and one-half years last past I have known the ground embraced within the boundaries of U. S. survey No. 435, commonly known as the Searl placer claim. I have frequently been over said ground, and on the 11th day of December, A. D., 1882, I, in company with Simon Mooney and others, made a thorough and careful examination of said ground; I have heard read the foregoing affidavit of said Simon Mooney and know the contents thereof, and each and every statement therein contained is true of my own knowledge, so far as such statements relate to said "Searl placer claims."

(Signed) MARX KAHN.

Subscribed and sworn to before me this 14th day of December, A. D., 1882.

[SEAL.] (Signed) T. L. BYRNE,
*Notary Public.*

104 P. DEPARTMENT OF THE INTERIOR, A. Y.
1884–88345. GENERAL LAND OFFICE, J. W. L.
WASHINGTON, D. C., *March 6th*, 1886. B. B. S.

Register and receiver, Leadville, Colo.

GENTLEMEN: I have this day considered the testimony taken at a hearing before you involving A. D. Searl's application for the Searl placer, survey No. 435.

The original application for patent was filed July 5, 1878 for 152.02 acres of land based on a location made Dec. 14, 1877, by Thomas Starr and seven other parties. Notice thereof was given by publication and posting from July 19, to Sept. 13, 1879. During the period of publication a large number of adverse claims were filed by lode claimants and suits were afterwards instituted thereon in accordance with the requirements of the statute.

The county judge of Lake county having previously applied on behalf of the inhabitants of "North Leadville" to enter the land as a townsite, a hearing was ordered to determine the character of the land as well as the priority of right as between Searl *et al.* and the townsite claimants. On the testimony taken at the hearing this office decided in favor of Searl, and the case having been appealed, the Secretary of the Interior, under date of April 17, 1880 (Copp's L. O. vol. 7, p. 36) affirmed the decision, holding that the
105 surveyor general's return as to the mineral character of the land was not overcome by the proof and that the tract should be held to be mineral. The townsite application was thereupon dismissed.

On April 5, 1881, E. O. Lowe filed an application for the Zulu lode, alleged to be within the limits of the Searl placer claim. By office letter dated May 31, 1881, the application was rejected but a hearing was ordered for the purpose of ascertaining whether or not there was a Zulu lode within the Searl placer. An appeal from this decision was filed. The hearing however was proceeded with and the testimony taken thereat was transmitted to this office. Applications for patents for other lode claims within the placer were filed. November 10, 1882, Searl filed an amended application for patent by which the claim was reduced in size to $101\frac{916}{1000}$ acres and all of the alleged lode claims, excluded except the Zulu and Lucy B. Hussey. The suits on all of the adverse claims were then dismissed.

Under the date of Dec. 14, 1882 Special Agent Robert Berry reported that he had investigated the Searl placer claim and found that there were no placer improvements thereon except the Oro Mining and Fluming Company's ditch, which was built years before this claim was located; that the other improvements thereon were

for townsite purposes and that the land was rapidly being built upon as the city of Leadville increased in size. He reported further that the land was supposed to contain lodes or ledges or carbonate mineral, and that the placer claim was clearly fraudulent.

106 Dec. 16, 1882, M. H. Sears on behalf of himself and two hundred other residents of Leadville filed a protest against the Searl application, alleging among other things that Searl and his grantors had not expended five hundred dollars on the claim; that it was not placer mining ground; that it was almost entirely covered by lode locations and was immediately adjacent to a well defined system of lodes, and that Searl never intended to work the premises as a placer claim. The papers in the case of Searl *v.* The Zulu Lode Claim and certain protests, as well as agent Berry's report were transmitted to the Secretary of the Interior on the 2nd and 20th of Dec. 1882. The Secretary in his decision dated Dec. 27, 1882, directed in view of all the facts and circumstances in the case raising a doubt as to whether the land was more valuable for placer mining than for other purposes, that a hearing be ordered to ascertain the character of the land and the status of all existing claims and interests, and suspended all prior orders and proceedings. The hearing was accordingly ordered and July 30, 1883, was fixed by the register and receiver for that purpose. On that day Messrs. Maxwell and Phelps appeared as attorneys for M. H. Sears and his associates and F. W. Owers for Searl. The case was adjourned to Aug. 14, 1883, when the attorneys for Sears *et al.*, withdrew the appearance of their clients. Objection at the same time was made by Searl to the notice, whereupon new notice was issued and the hearing set for Sep. 20, but was not proceeded with until November 15, 1883 at which time D. E. Parks and Special Agent Berry appeared for the Government and Owers for claimant. Webdzell appeared for Sears and four other

107 protestants for the purpose of moving a continuance upon the ground that they had not been served with proper notice of the hearing. You overruled the motion and attorneys for Sears and for claimant excepted. The claimant could not be injured by a defective notice to his opponents and his objections should not have been entertained; nor could the protestants demand the notice as a matter of right as they were not parties in interest; but if it were otherwise, their objection ought not to have been sustained under the circumstances of this case. They were advised of the hearing and appeared by attorney on the day fixed for that purpose and thereby waived all objections to the insufficiency of the notice. It also appears from the testimony taken at the hearing that Sears and those acting with him had entered into some kind of a compromise with Searl by which they were to desist from any further attempt to defeat the placer application. Claimant also objected to the notice upon the grounds that it did not contain the names of the protestants; that it was not served on certain of them who were non-residents of the State and that it did not give the precise ques-

tion of fact to which the investigation was addressed. The objections were properly overruled as claimant was advised of the points in issue; and as he appeared and produced his testimony at the trial and cross-examined the Government witnesses he — estopped from pleading the insufficiency of the notice. The hearing was proceeded with and a large amount of testimony taken both on the part of the Government and the claimants, fifteen witnesses being introduced by the Government and twelve by
108 claimant. The testimony relates principally to the character of the land; its value for placer and lode mining and for townsite purposes and as to the character and value of the improvements thereon. The witnesses for the Government all of whom are practical placer miners, except two, testify that they had thoroughly prospected on the various shafts and prospect holes, which had been sunk in different parts of the claim, for placer mineral, but found none; that the character of the formation did not indicate the presence of such mineral and the claim had no value for placer mining; that there were a great many dwellings and other houses thereon, and that a large portion of the claim was used for townsite purposes, that being its principal value; that it adjoins the city of Leadville and is occupied by three or four hundred persons, some of whom commenced to build thereon in 1878 or 1879. The witnesses W. A. Davis prospected the ground in 1866, and again in 1883 but found no mineral.

Abraham Lee spent two days prospecting it in 1879 and got light color of gold, but not of such a character or such quantity as to indicate placer mineral of any value.

It appears from the evidence submitted by the Government that no placer improvements were ever placed on the claim by Searl or his grantors; that there were a large number of shafts and prospect holes sunk, most if not all of them by parties prospecting for lodes, and that water could not be brought on to the claim for placer mining without great expense.

The witnesses for claimant, John S. Anderson, A. H. Mallory
109 and Charles G. Arnold found mineral on the land and T. G. Johnson found color, and some of the other witnesses gave their opinion that the ground was mineral without, however, ever having prospected it. Sanderson was the locator of the Ingersoll lode claim which lies within the limits of the Searl location and the alleged discovery of mineral by him was found in the discovery shaft of this claim. The shaft was sunk with a view of discovering mineral in place and not placer and the claim was located and treated by him as a lode claim, but afterwards sold to Searl. He admits that mineral in paying quantities has not to his knowledge been discovered and states that his opinion as to the mineral character of the land is based on the surroundings. His opinions as to the relative value of the land for mineral and townsite purposes are extravagant and not well considered. He states that the tract has little or no value as a townsite, although it adjoins Leadville, and has a large number of dwellings thereon, which are and have been

for years occupied by residents of Leadville. He estimates the value of the land for placer mining at two hundred thousand dollars, while he admits that mineral in paying quantity has never been discovered although thoroughly prospected.

Mallory was an employee of Searl. The mineral or color referred to by him was alleged to have been discovered in 1879. He says the claim may be found to be very valuable for mineral when the bed-rock is reached or it may not. He claims that the assessment work for 1880 was done under his directions consisting of eight ten foot holes. He also says that some work was done in 1881
110 and 1882. This witness was interested with Searl in some of his business transactions.

Arnold's examination of the ground was superficial and he did not discover mineral in paying quantities. Johnson found nothing but color. He had been in the employ of Searl.

Andrews claims to have — the assessment work for 1881. Searl and Hall thinks the land is placer ground but neither of them ever prospected it. Searl is the applicant and Hall was one of the original locators and now owns one-eighth of the claim. The witness Jas. Powell did not prospect the land and based his judgment on the character of the adjoining claims. The other witnesses state no fact from which it could be inferred that the claim contains placer mineral. Their statements are confined principally to the value of the ground for townsite and other purposes; they holding that it is chiefly valuable for placer mining and has little or no value for townsite purposes. By agreement of parties testimony taken at the hearing in July 1881 in the cause of The Owners of the Zulu Lode *v.* The Searl Placer, upon the question as to whether there exists a Zulu lode within the Searl placer was to be considered and treated as testimony in this case.

Eight witnesses testify on behalf of the Zulu claimants as to the formation found in the Zulu discovery shaft and that it was lode ground.

The witnesses Hebschle, Schlophohl & Dieneff claim to have found mineral in rock in place in the nature of iron carrying
111 silver and the others expressed the opinion from what was found in the dump and from the character of the adjacent claims which contain similar formation to this, that mineral in place exists.

The seven witnesses for Searl, a number of whom examined the Zulu shaft state that no lode was ever discovered.

Gildersleeve and Houghton testify that no placer mining or placer work was ever done on the Searl placer.

Mallory's testimony is substantially the same as that given by him at the subsequent hearing and referred to above.

You decided that patent should not be issued for the Searl placer. 1st. Because the improvements thereon were not sufficient, nor of the character required by law, and, 2d, because the evidence did not satisfactorily show that the claim was more valuable for placer mining than for other purposes. From this decision Searl appealed.

His counsel contend in their argument that the question as to the character of the land is *res adjudicata* by former trial and final decision thereon and that the testimony submitted affirms the correctness of the former conclusion.

The trial and decision referred to were in the case of North Leadville *vs.* Searl, above mentioned.

One of the essential principles necessary to constitute a matter *res adjudicata* is the identity of the parties. The parties to the present hearing were not parties to the former trial. Independent of this however the objection to the hearing upon the ground mentioned is not well taken. The matter as to the character of the land
112 is not finally adjudicated until the title passes from the Government. It could not be otherwise, from the very nature of the duties and responsibilities of the officers of the Land Department. The issuance of patents for mineral lands under the agricultural laws is unauthorized and inhibited, as well as the issuance of patents under the mineral laws, where mineral has not been discovered; so that the responsibility of determining the question as to the character of the land correctly rests with this office up to the date of the issuance of the patent. It is not a matter simply between adverse claimants, which may be settled by their consent, but it is one which must be decided from the best evidence attainable from all legitimate sources, and so long as the subject matter is under the control of the Land Department no number of trials and decisions will estop further inquiries and investigations to assure a satisfactory conclusion. The character of the land has therefore not been finally determined and it must be decided upon the testimony taken at the hearing. After carefully considering the same I am satisfied that the land is not placer mineral ground. To authorize a placer patent, mineral in paying quantities should first be discovered, or the character of the information be shown to be such as to indicate with reasonable certainty that mineral exists in such quantities and of such a quality as will pay to work it either at the present or at some future time. The tract must be shown to have a real value at date of entry for the mineral therein. The land has been thoroughly prospected for a great many years and nothing more has been discovered than might be found any where in the vicinity of Leadville.

No mineral of consequence has been shown by the proof to
113 have been discovered and no placer mining or work has been done.

I am not satisfied that the requisite expenditure has been made and the character of what was made is not such as is contemplated by the law, it not being for the improvement of the claim for placer mining, or for the discovery of placer mineral. While the proof does not, in my opinion, show the discovery of a lode within the placer survey, it does not indicate the probable existence of mineral in rock in place. I am satisfied from all the evidence that claimant has not acted in good faith, and that he is attempting to acquire title to the land on account of its value for townsite purposes and for the lodes supposed to be contained therein.

The application is accordingly rejected subject to appeal within 60 days. So notify the parties.

Very respectfully, S. M. STOCKSLAGER,
*Ass't Commissioner.*

114 Vol. 6–908. DEPARTMENT OF THE INTERIOR, F. L. C.
WASHINGTON, R. B.
*November* 13, 1890. J. B. McN.

Searl placer. *Mineral Application.*

The Commissioner of the General Land Office.

SIR: This is an appeal by A. D. Searl from your office decision of March 6, 1886, rejecting his application to make mineral entry for the Searl placer claim amended survey No. 435, Leadville, Colorado.

His original application was filed July 5, 1879 and 150.02 acres. By the pending application filed March 10, 1882, his claim was reduced to 101.918 acres thereby excluding certain conflicting lode claims.

It appears from the statements of your office that prior to the original application the county judge having applied on behalf of the inhabitants of North Leadville to enter the land as a townsite, a hearing was ordered to determine its character and the priority of right, that upon the evidence adduced your office decided in favor of Searl, and that on appeal, this department on April 17, 1880, (7 C. L. O., 36,) affirmed that decision and held that the surveyor general's return as to the mineral character of the land had not been overcome. The townsite application was accordingly dismissed.

115 Subsequently on the report of a special agent of your office and the representations of certain residents of Leadville, alleging among other things that the ground was not placer, the department December 27, 1882, finding "a great doubt whether or not the ground claimed is more valuable for placer mining than for other purposes" ordered a hearing to ascertain the character of the land and the status of all existing claims and interests and suspended all prior orders and proceedings.

Upon the evidence adduced at the hearing had (November, 1883), in pursuance of the above order the local officers found that the land was not distinctively valuable for placer mining and that the same had not been improved as required by law and recommended the rejection of the pending application.

On Searl's appeal from this ruling the same was affirmed by your said office decision of March 6, 1886.

In his appeal here he alleges that the question as to the character of the land became *res adjudicata* by reason of the action of the department (7 C. L. O., 36, *supra*) upon the former hearing.

This contention is disposed of adversely to him by the departmental decision in the case of The Central Pacific R. R. Co. *v.* Valentine (11 L. D., 238), wherein it was held (p. 246), that the Land Department had jurisdiction to ascertain and determine what lands

were subject to the railroad grant (from which mineral land was expressly excepted) and that such jurisdiction continues "until the lands have been either patented or certified to, or for the use of, the railroad company."

116 The matters touching the merits of the case are sufficiently stated by your office in the decision appealed from and reference is had thereto.

It will therefore be quite unnecessary for me to comment in detail, upon the voluminous testimony submitted in this case.

It is the rule of the department that the "first care in recognizing an application for patent upon a placer claim must be exercised in determining the exact classification of the lands," which are sought to be acquired as such. (Sec. 1 Circular *cicular* September 22, 1882, *I.* L. D. 685)

The testimony produced at the hearing had before the local officers in November, 1883, although conflicting in its character, I think by a fair preponderance, establishes the fact that continued prospecting for several years failed to disclose in any appreciable quantity, the presence of valuable placer mineral in the claim or to establish as a "present fact" within the meaning of section 2329, R. S. the "placer" character of the land. Peirano *et al. v.* Pendola, 10 L. D., 536. It further appears that while the appellant has constructed some ditches on the tract, he has brought no water thereon and that the work on the claim consisted mainly in making a considerable number of shafts with the view to the discovery of "lodes" and not for the purpose of "placer" development.

The testimony was taken before the register and receiver, who saw and heard the witnesses on the stand, observed their demeanor and could judge therefrom who is most worthy of credit.

117 Their joint opinion is accordingly entitled to special consideration. Kelley *v.* Halvorson (6 L. D., 225); Morfey *v.* Barrows (4 L. D., 135.)

In accordance therefore with the views heretofore expressed, I must find that no sufficient warrant is shown for disturbing the concurring decision of the local and your office, which under like circumstances are generally accepted by this department as conclusive. Chichester *v.* Allen (9 L. D., 302); Conley *v.* Price (*id.*, 490), Cleveland *v.* North, 11 L. D., 344.

The judgment of your office is affirmed.

The record transmitted is returned herewith.

Very respectfully, GEO. CHANDLER,
*Acting Secretary.*

118 Thereupon the plaintiffs stated that if the proceedings before the Commissioner were to be allowed in evidence, that the letter from the Secretary of the Interior to the Commissioner of the General Land Office, as reported in 22 Land Decisions, page 527, should be read in connection therewith; to which counsel for defendant objected as immaterial, irrelevant and incompetent, which

said objection was overruled, to which ruling counsel for defendant then and there excepted.

Said letter was thereupon read in evidence and is in words and figures as follows:

Secretary Smith to the Commissioner of the General Land Office, May 13, 1896. (P. J. C.)

The record before me shows that the Clipper Mining Company on August 31, 1893, made application for patent for the Capitol, Clipper, Congress, and Castle Lode claims, lot No. 6965, Leadville, Colorado land district, and that during the period of publication adverse claims were filed, among them one by A. D. Searl, *et al.*, alleging conflict with the Searl placer claim. Suits were instituted, but all were dismissed except the Searl placer. Thereupon the applicant applied to purchase the land claimed. The local officers rejected this application and returned the purchase money for the reason that there was nothing on file to show that the suit of Searl *et al.*, had been finally determined and disposed of.

The applicant appealed, and your office by letter of April 27, 1895, affirmed the action, whereupon this appeal is prosecuted, assigning error as follows:

119 1. It was error for the Commissioner to hold that M. A. No. 4359, is subject to the Searl placer, the latter having no standing before this department. * * *

2. It was error for the local office to receive the so called adverse claim, offered by the Searl placer claimants, as an adverse claim, but said paper should have been received and filed as a protest.

3. There being no pending application by the placer claimants, an application to enter as a lode claim is always in order, the only question being as to width of the lode claims.

It seems that application for patent for the Searl placer was made in 1882. A hearing was had "to ascertain the character of the land and the status of all existing claims." As a result of that hearing, the application for patent was rejected by the local officers, your office sustained that action, and the department affirmed your office judgment.

(Searl Placer, 11 L. D., 441.)

It was contended by counsel for applicant that the judgment in the Searl placer "was a complete and final adjudication;" that the land embraced therein was not placer ground, and could not be entered as such, hence the adverse claim filed by Searl *et al.*, based as it is upon land for which application for patent has been rejected, ought not to be accepted by the department as a legal or proper adverse claim, and its application should be received and patent issue notwithstanding.

120 It is not deemed necessary to enter into an extended discussion of the propositions suggested by counsel. It is sufficient for the purpose of disposing of this case to say that so far as the record here shows the department is ousted of all jurisdiction

until the case now in court is finally disposed of. Under the provisions of section 2326, when the adverse claim is filed all proceedings in the department "shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction."

Last Chance Mining Co. *v.* Tyler Mining Co., 157 U. S., 683;
Richmond Mining Co. *v.* Rose, 114 U. S., 576;
Jamie Lee Lode *v.* Little Forepaugh Lode, 11 L. D., 391;
Reed *v.* Hoyt, 1 L. D. 603.

The judgment of the department in the Searl placer case went only to the extent of rejecting the application for patent. The department did not assume to declare the location of the placer void, as contended by counsel, nor did the judgment affect the possessory rights of the contestant to it.

Your office judgment is affirmed.

See 22 L. D., p. 527.

Thereupon the defendant introduced in evidence a conveyance showing the transfer of the title originally acquired by the locators of the said Capitol, Clipper, Castle and Congress Lode mining claims to the defendant in this suit.

And the foregoing was the substance of all the testimony introduced on behalf of either side; and thereupon the court announced as follows, to wit:

121

APRIL 28, 1898.

ELI MINING COMPANY ET AL.
*vs.*
CLIPPER MINING COMPANY ET AL.

COURT: "I am not going to decide this case just at this time, but will let you know just what I intend to do so far as the evidence is concerned. The court is satisfied from the evidence that the Searl placer was duly located, as required by the law, in 1877, and that the annual labor has been performed, as required by law, to the present time. The court is further satisfied that the defendants have discovered a lode claim within the boundaries of the Searl placer, but that the discovery was made subsequent to the location of the placer. The questions to be determined in this case are: Has the locator of the placer the exclusive right to the possession, and can a prospector enter within the boundaries of the placer and discover a lode claim before application for a placer patent is made? Those are the questions involved that I would like to have you furnish me briefs and arguments on, and I will then decide the case, and will enter the decision as of to-day, and the exceptions to the decisions may also be made as of to-day.

Plaintiffs shall have one week to file their briefs, and the defendants one week thereafter to file their answer; that is, one week after service of the answer is had; and plaintiffs shall have one

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week after service to reply." To which action of the court in finding the Searl placer to be a valid placer mining claim the defendant then and there excepted.

And afterwards said counsel having submitted arguments on the question, the court did enter judgment in favor of the plaintiffs, finding as a matter of law that the said defendant had no right to enter within the limits of the Searl placer and locate the lode mining claims mentioned herein, which said opinion and judgment of the court was in words and figures as follows, to wit:

STATE OF COLORADO, } ss:
*County of Lake,* }

In the District Court.

THE ELI LAND & MINING COMPANY ET AL., Plaintiff-, }
*v.* }
THE CLIPPER MINING COMPANY, Defendant. }

This cause having been tried by the court and the court having found *that* the evidence that the ground in controversy was a valid and subsisting location known as a placer mining claim; that plaintiffs are the owners and were in possession at the time alleged in the complaint.

And the court having requested counsel to submit briefs
123 and citation of authorities upon the question.

Has the locator of a placer the exclusive right to the possession thereof, and can a prospector enter within the boundaries of a placer claim and discover a lode claim before application for placer patent is made?

The briefs presented by counsel having been carefully examined the court finds that a placer claim is by the statutes of the United States defined as "all forms of deposit, excepting veins of quartz or other rock in place, and shall be subject to entry and patent under like circumstances and conditions, and upon similar proceedings as are provided for veins or lode claims."

Chief Justice Waite in the case of Belk *vs.* Neagher, 104 U. S. says, "A mining claim perfected under the law is property in the highest sense of that term."

In Gwillim *vs.* Donnellan 115 U. S. a later case he says: "A valid and subsisting location of mineral lands made and kept up in accordance with the provisions of the Statutes of the United States has the effect of a grant by the U. S. of the right of present and exclusive possession of the lands located." If when one enters on land to make a location there is another location in full force which entitles its owner to the exclusive possession of the land, the first location of the land operates as a bar to the second.

This doctrine has been announced by the supreme court of California in Quigley *vs.* Gillett *et al.* 101 Cal. and by the su-
124 preme court of Colorado in Armstrong *vs.* Lower 6th Colo. Omar *vs.* Soper 11 Colo. McFeters *vs.* Pierson 15 Colo. Seynore *vs.* Fisher 16 Colo. Girard *vs.* Carson, 22 Colo. These decisions seem to have been concerning the location of lode mining

claims. There seems to be no good reason why the same rule should not prevail in placer mining claims.

Since examination of authorities in this case I feel compelled to make a different ruling from that made in a similar case in the district court of Pitkin county.

Therefore the locator of a placer mining claim has the exclusive right to the possession thereof; and a prospector cannot enter within the boundaries of a placer and discover a lode claim unless there has been an abandonment by the placer claimants.

The defendants having entered upon a valid subsisting location of a placer mining claim owned by and in the possession of the plaintiffs did not initiate any right whatever.

It is therefore considered ordered and adjudged that plaintiffs are the owners of and entitled to the possession of the ground in controversy in this action by virtue of a compliance with the laws of the United States and the State of Colorado.

Judgment will therefore be entered in favor of the plaintiffs for the ground in controversy and for costs.

THOMAS A. RUCKER, *Judge.*

125 To which finding of the court counsel for defendant then and there duly excepted; and afterwards judgment was entered in said cause in accordance with the said opinion and finding of the court, to which judgment counsel for defendant then and there excepted.

And forasmuch as the matters and things herein set forth do not fully appear of record counsel for defenda-ts have prepared and tender this their bill of exceptions to the judgment of said court, so that said matters can fully appear of record, which is accordingly done by the judge of said court by signing and sealing the same this 6th day of October, A. D., 1898 as of 9th day of July, 1898, when tendered.

THOMAS A. RUCKER, *Judge.* [SEAL.]

We agree that the foregoing writing and exhibits correctly states and show what *it* purports to state and show. It is understood that we say this without waiver of any rights whatever of our clients in the premises.

CHAS. CAVENDER,
JOHN A. EWING,
*Attorneys for Pl'ffs.*

We agree to foregoing bill of exceptions.

THOMAS, BRYANT & LEE,
*Attorneys for Def't-.*

125½ The foregoing transcript is endorsed in words and figures as follows, to-wit:

No. 4115. In supreme court State of Colorado. The Clipper Mining Co., plaintiff in error, *vs.* The Eli Mining & Land Co. *et al.*, defendants in error. Transcript of record, bill of exceptions and assignment of errors. Filed in supreme court this 19th day of Sept. 1899. H. G. Clark, clerk.

And thereafter, and on the 8th day of April, A. D. 1901, the following order of the supreme court of Colorado was entered:

126 In the Supreme Court of the State of Colorado, April Term, 1901.

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| THE CLIPPER MINING COMPANY, Plaintiff in Error, *vs.* THE ELI MINING AND LAND COMPANY, A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray, Defendants in Error. | 4115. Error to District Court of Lake County. |

At this 8th day of April, A. D. 1901, this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said district court in and for the county of Lake as also upon the matters assigned for error herein; and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is no error in the proceedings and judgment aforesaid of said district court. It is therefore considered and adjudged by the court that the judgment aforesaid of said district court be and the same is hereby affirmed, and stand in full force and effect; and that this cause be remanded to said district court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said district court in the cause, notwithstanding the said writ of error. It is further considered and adjudged by the court that said defendants in error do have and recover of and from said plaintiff in error their costs in this behalf expended, to be taxed, and that they have execution therefor. And let the opinion of the court filed herein be recorded.

Which opinion was in words and figures as follows, to wit:

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| 127 THE CLIPPER MINING COMPANY, Plaintiff in Error, *v.* THE ELI MINING AND LAND COMPANY ET AL., Defendants in Error. | No. 4115. |

Error to the district court of Lake county.

Chief Justice CAMPBELL delivered the opinion of the court.

The plaintiff in error (defendant below) owns four lode mining claims, situate in Lake county, called the Capital, Clipper, Congress and Castle lodes, and the defendants in error (plaintiffs below) own the Searl placer mining claim, within the boundaries of which these lode claims are located. The present controversy relates to the territory thus in conflict. The placer was the prior location, and was made in the year 1877. The plaintiff in error having made application in the land office for patent of its lode mines, the defendants

in error filed therein an adverse claim, and within the statutory time brought this action in the district court of Lake county to enforce it.

The plaintiffs rely upon a prior location of the conflicting territory as part of their placer claim. The complaint is in the ordinary form in actions of this character. After a general denial of the material allegations of the complaint, the answer sets up four separate defenses, all of which grow out of the following facts, which, in varying language, are set up in each defense.

128 On the 12th of December, 1877, A. D. Searl and others located the Searl placer, and on the 5th of July, 1878, applied for a patent therefor. Numerous protests were made against it, and on the 10th of November 1882 an amended application was filed against which protests were likewise made upon the ground that the same was not placer ground, and was only valuable for lode claims, or townsite purposes. The Land Department ordered a special investigation to ascertain the character of the ground and the good faith of the applicant. The special agent declared that the land was not placer ground, and on the strength of his report a hearing was ordered before the local land office of the district, the result of which was a dismissal of the application, for it was not then made to appear, as a present fact, that the ground was distinctively valuable for mining purposes, or that the applicant had made the improvements required by statute. This ruling was affirmed by the Commissioner of the Land Office and in turn by the Secretary of the Interior. Twelve days after the latter's decision, the grantors of defendant company entered upon the ground within the boundaries of the placer location and thereafter located thereon the lode claims in question.

The special defenses sought to be interposed were substantially: *first*, that plaintiff was not entitled to recover because, upon the previous application for a patent of the Searl placer, there was a decision of the Land Department that the ground included within its boundaries was not placer ground, and the attempted location was for that reason void, and such decision was *res adjudicata* of the present controversy; *second*, assuming the existence of a prior

129 valid placer location, nevertheless defendant, prior to the time patent was asked, went upon the placer surface area and made locations of lode claims which were then and theretofore known to exist, and, therefore, in law the same were a part of the unappropriated public domain and subject to location as lode claims.

There was a replication by plaintiffs denying the new and special matters of defense, and upon the issues thus joined, in a trial to the court without a jury, the findings were that the Searl placer was duly located as required by law in the year 1877 and thereafter the annual labor had been performed as the statute provides, and that defendant's grantors had discovered the lode claims within the boundaries, and subsequent to the location, of the Searl placer. Based upon these findings of facts, the conclusion of law was drawn that a prior location of a placer carries with it the exclusive

right of possession of the surface included within the exterior boundaries, and a prospector might not enter thereupon and prospect for, or discover, a lode claim before application for the placer patent is made, unless by abandonment the placer claimant has lost his rights. And there being no evidence of such loss, it was accordingly held that the acts of defendant in entering upon the valid subsisting placer location did not initiate any right whatever. Judgment was therefore entered in favor of the owner of the placer location, and to reverse it this writ of error is prosecuted.

1. It is insisted by plaintiff in error that the Land Department, with which is entrusted the determination of such questions, has declared this placer location void because not on placer ground, and that such determination is decisive of the present con-
130 troversy. It is unquestionably the law that findings of fact by the Land Department as to matters within its jurisdiction are conclusive upon the courts whenever a collateral attack is made upon them. They may, in a proper proceeding, be impeached for fraud or mistake, but not in actions like the present. This rule, however, has no application to the facts in this record. The application for a patent to the placer was rejected, but there was no decision that the ground in question was not placer ground; but merely that, as a then present fact, there was not such a showing by the applicant as entitled him to a patent. Amended applications for a patent of a mining claim are permissible under the practice in the Land Department. There was no attempt finally or definitely to determine that the ground was not placer ground, or that the location was void, and to that effect are its own decisions, as will be seen by reference to the official reports.

7 Copp's Land Owner, 36;
*In re* Searl Placer, 11 Land Dec. 441;
*In re* Clipper Mining Co., 22 Land Dec. 527.

In the last case, the Secretary of the Interior, in speaking of the contention made in this very case, says: "The judgment of the department in the Searl placer case went only to the extent of rejecting the application for patent. The department did not assume to declare the location of the placer void, as contended by counsel, nor did the judgment affect the possessory rights of the contestant to it." See also, *Clipper Mining Co. v. Searl*, 29 Land Dec., 137. Indeed, the question as to the character of the land sought to be appropriated by claimants under the public land laws is reserved,—unless under the law referred to some court,—and may be passed upon, by the department until patent issues.

Barden *v.* N. P. R. R. Co., 154 U. S. 288.

131 This court in *Beals v. Cone*, 27 Colo. — (62 Pac. Rep. 948) held that a decision of the Land Department like the one in question is equivalent to nothing more than a judgment as of nonsuit, and not conclusive upon the department itself or upon the parties.

An additional reason why the plea of *res adjudicata* cannot be sus-

tained is that in the former proceedings the parties are not the same as those in the present action.

2. The principal question involved is much more important and difficult of solution. In discussing this feature of the case, it must be considered as established that the Searl placer was an existing valid location at the time of the attempted location of the lode claims. We make this statement as counsel for plaintiff in error themselves admit that such issue was present in the case, and was determined by the trial court upon conflicting evidence, and as bearing upon this point they make no question but that the same was rightly determined. The question, therefore, is presented whether, and if so, in what circumstances, one may, before application for a patent of a prior valid placer location is made, go upon the same for the purpose of prospecting the ground, and thereafter make a location of a lode claim based on a discovery thereafter and thus made of a vein or lode therein.

In *Aurora Lode v. Bulger Hill & Nugget Gulch Placer*, 23 L. D., 95, it was held by the Secretary of the Interior that the discovery and location of a placer mining claim establishes in the owner the right to the possession of the superficial area within its boundaries for all purposes connected with, and incident to, the use and operation of the same as a placer mining claim; but that such location does not operate to give the right of possession to known veins or
132 lodes within its limits, or preclude the right of discovery and location thereof by others. It was also held that a judicial award of the right of possession to an adverse placer claimant as against a lode applicant, does not preclude subsequent departmental inquiry upon the allegation of the lode claimant that the placer claim embraced known lodes or veins, where it appears that such question was not at issue before the court for determination by its judgment.

This case was referred to with approval by this court in *Mt. Rosa M. M. & L. Co. v. Palmer*, 26 Colo. 56. In the latter case the facts were that lode claims were known to exist, and were also duly located within the limits of a previously located placer claim before patent of the latter was applied for. A patent for the placer having been issued in such circumstances it was held that, inasmuch as the applicant did not at the time mention the lode claims, or claim them by virtue of lode locations, they were excluded from the grant of his patent. And as it further appeared that the locators of these lode claims went upon the placer ground and made locations upon veins known to exist before the application for patent was made, the conclusion was that the patentee of the placer could not recover possession of the lode claims, for they were properly located. The court said that in making them no right of the placer owner was invaded, and that their validity was not affected by the fact that they were made within the surface boundaries of a prior placer location. For the purposes of the case, it must have been assumed as true that when the entry by the locators of the lode claims was made the lodes themselves were known to exist.

133 If the facts of the case at bar were the same as those in the Mt. Rosa case, we would, under its doctrine, be obliged to reverse the judgment; but they are essentially different in at least one particular to which we shall hereafter refer. But before passing to that, we notice the contention of defendants in error that in Calhoun G. M. Co. *v.* Ajax G. M. Co., 27 Colo. 1 (59 Pac. Rep. 607, 618) we have virtually held that one who has made a valid location of a placer claim has for all purposes exclusive right of possession thereto so long as he complies with the law, and that the territory embraced therein is not subject to adverse location by a claimant of the same ground under a subsequent lode location, though the lode is known to exist before application for patent is made. Our decision in this case was not intended to qualify the doctrine established in the Mt. Rosa case. In the Calhoun case where a lode location was involved, we were not considering, as was true in the Mt. Rosa case, the kind or extent of possession which follows a valid location of a placer claim. What was said in the Calhoun case was true as applied to a lode claim, for the right of possession of the lode claim includes the entire surface area. In the Mt. Rosa case, however, wherein was defined the rights of a placer claimant, we said that a placer location gives a qualified possession of the ground located;—that is to say, it confers upon the owner the exclusive right of possession of the surface area for all purposes incident to the use and operation of the same as a placer mining claim, and all unknown lodes or veins, but does not give the right of possession to known veins within its limits.

134 It is obvious that the facts of the case in hand do not bring it within the principles laid down in the Mt. Rosa case. If, in the case at bar, the lode claims were known to exist at the time of the entry of defendant's grantors upon the Searl placer, under the decision in the Mt. Rosa case the entry was not unlawful; but if, on the contrary, the veins were then unknown, by the same decision the right of possession of this ground belonged to the owners of the placer location. Their right of possession included these unknown veins and the entry for prospecting was a trespass, and no title could thereby be initiated.

As the evidence was not brought up in the bill of exceptions, we must assume in support of the judgment below that the proof was against the defendant upon this point. Indeed, the specific finding of the trial court that defendant's grantors went upon plaintiff's prior existing placer location and *discovered* and located lodes therein, involves the finding that the lodes were unknown at the time of the entry; for if they were known, they were not discovered by the prospectors, but were already subject to location by them; and if then unknown, the placer owner was entitled to their exclusive possession, and entry upon them by others constituted a trespass and could not initiate title.

Our conclusion, therefore, is that one may not go upon a prior valid placer location to prospect for unknown lodes and get title to lode claims thereafter discovered and located in this manner and

within the placer boundaries, unless the placer owner has abandoned his claim, waives the trespass, or by his conduct is estopped to complain of it. If the trial court intended to rule that in no circumstances may one, before application for a patent of a placer claim, go upon the ground within its exterior boundaries for
135 the purpose of locating a lode, it went too far; yet as general language in an opinion must be taken in connection with the facts of the particular case, the ruling here should be limited to the facts disclosed by the record, and no prejudicial error was committed. For, under the authorities, a prospector may not enter upon a prior placer location for the purpose of prospecting for, or locating, unknown lodes or veins; and to uphold the judgment we must presume that the evidence before the trial court showed that the veins or lodes upon which defendant's grantors based their locations were unknown when they entered upon the Searl placer for the purpose of prospecting.

The mere fact, then, that the judgment may have been based upon a legal proposition—too broadly stated as a universal rule—that in no case may a location of a lode claim be made within the boundaries of a prior valid placer location,—a legal conclusion which, as we have said, is only partially right,—is not, under the facts of this case, sufficient to work a reversal; for certainly a lode location may not thus be made except of a known lode. Though a prospector may believe that within the limits of a placer location a lode may exist and by development work be disclosed, he has not the right to enter thereupon for the purpose of exploiting the ground to confirm his belief.

The judgment is affirmed.

Affirmed.

136 I, Horace G. Clark, clerk of the supreme court of the State of Colorado, do hereby certify that the foregoing is a true copy of an original opinion of the supreme court of the State of Colorado, filed in the above entitled cause on the 8th day of April, A. D. 1902, and of an original judgment entered in said cause on said day, and now remaining of record at my office.

Witness my hand and the seal of the court, affixed at my office, in the city of Denver, this 26th day of March, A. D. 1902.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,
*Clerk Supreme Court,*
By —— ——, *Deputy.*

137 And thereupon, and on the 26th day of July, A. D. 1901, the plaintiff in error in the above entitled cause appeared by Thomas, Bryant & Lee, its attorneys, and filed its petition for rehearing and brief in support of same, which are in words and figures as follows, to-wit:

138 In the Supreme Court of the State of Colorado.

THE CLIPPER MINING COMPANY, Plaintiff in Error,
*vs.*
THE ELI MINING AND LAND COMPANY *et al.*, Defendants in Error.
} Petition for Rehearing.

Comes now the plaintiff in error in the above entitled cause, and petitions the court for a rehearing of the same for the following reasons, to-wit:

1. The court erred in its first proposition of law in holding that the decision of the Secretary of the Interior in the matter of the protest against A. D. Searl's application for a patent did not decide that the ground was not placer ground, and in holding that said judgment of the Land Department was not conclusive.

2. The court erred in its second proposition of law in holding that as a matter of fact, the evidence in the court below did not show that the lode claims located by the plaintiff in error were known lodes at the time of the location, and the court erred in its proposition of law in holding that a lode location cannot be made within the limits of an existing placer location, except upon a known lode.

3. The court erred in its construction of the two cases of The Aurora Lode *v.* The Bulger Hill and Nugget Gulch Placer, 23 L. D. 93 and in its construction of the Mt. Rosa M. M. & L. Co. *v.* Palmer 26 Colo. 56.

139 For the reasons stated, the court should grant a rehearing and withdraw its former opinion, and in support of this motion the following brief is herewith filed.

THOMAS, BRYANT & LEE,
*Attorneys for Plaintiff in Error.*

140 In the Supreme Court of the State of Colorado.

THE CLIPPER MINING COMPANY, Plaintiff in Error,
*v.*
THE ELI MINING AND LAND COMPANY *et al.*, Defendants in Error.
} Brief in Support of Petition for Rehearing.

The court in the opinion handed down passes upon two propositions. First upon the effect of the decision of the Land Department, that the ground in controversy was not placer ground; and second, the proposition as to the right of a prospector to discover and locate a lode within the limits of a mere possessory placer location. We believe that the court reached a conclusion upon each of these points opposed to all of its own decisions, and to all of the decisions of the Federal courts, both *nisi prius* and final that have passed upon these questions.

We believe that we can demonstrate that inadvertently the court has misconstrued the facts in the cases previously tried before it,

and that having done this and having also shown that the decision is opposed to the decisions of the Supreme Court of the United States, the court will grant our petition for rehearing and withdraw the opinion already filed. We will take up these points in the order indicated.

1. Substantially stated, the facts in regard to the application to the Government for a patent upon the Searl placer are, that a patent was applied for and after thorough investigation was refused because the Land Department decided that the land was not valuable for placer mining purposes. This court says "the application
141 for a patent to the placer was rejected but there was no decision that the ground in question was not placer ground; but merely that as a then present fact, there was not such a showing by the applicant as entitled him to a patent." The court then says that amended applications for patent are permissible, and that there was no attempt finally or definitely to determine the character of the ground. We submit that when the court says the Land Department rejected the application for a patent because the land was not then of a sufficient placer character to entitle the applicant to a patent, the controversy is at an end. We would like for the court to answer this one question: If a locator is not entitled to a patent because he has not discovered mineral within the limits of his location, does he have any possessory rights under his location? In other words, can a patent be refused upon a ground that destroys the right to make a location and the location itself remain good? We readily concede that the Land Department itself, until a patent finally issues, has a right to reverse its own rulings, has the right to consider an amended application, but until it does so its solemn adjudications once made remain binding upon all third parties. If a party applies for a patent upon a placer or lode claim and his application is rejected because he has not completed his five hundred dollars' worth of work, or because he has failed to post his patent application upon his claim, or for any reason connected with the application itself as distinguished from the possessory title, then the refusal to grant a patent does not interfere in the slightest degree with his possessory title, but if the application is rejected for any rea-
142 son, that goes to the very foundation of his right to hold the ground as against the United States, then we insist that its rejection destroys not only the application for a patent, but whatever possessory rights the applicant may have. As in this case when the Land Department held that the ground is non-placer in character, what possessory title can possibly remain? As said by Judge Hallet in passing upon this identical proposition and with reference to this identical placer, the rejection of the placer throws the ground open to relocation just the same as any other portion of the public domain.

The Land Department has expressly held that there was a decision declaring this ground to be non-placer. In the case of Clipper Mining Company *v.* Searl, the Commissioner of the General Land Office on the 20th of December, 1898, expressly stated that the

Searl placer was rejected because of the non-placer character of the land, and this decision of the Commissioner's was affirmed in 29 L. D. 137. We submit with this petition a copy of the decision of the Commissioner in that case. We urge this matter most strongly upon the attention of the court.

2. The proposition as to the right of a prospector to discover and locate a lode within the limits of a mere possessory placer location. The court begins its discussion of this second proposition with the statement that counsel for plaintiff in error admitted that the Searl placer was an existing valid location at the time of the attempted location of the lode claims. Counsel as a matter of fact admits no such thing. We do admit that there was conflicting evidence in the court below on this point, and that the trial court did decide as a matter of fact that a valid placer location was made. We are forced to admit these things because they appear in the record.

143 The judge who tried the case below is the only man living or dead who ever held office, and before whom this question has ever been presented who decided the facts in this way. In all former contests in all suits in the Federal courts before Judges Riner and Hallett, it has always been held without an exception that this ground was not placer ground, and could not be located as such. What we do insist upon, and have insisted upon, is that even conceding for the sake of argument that this was a valid placer location, yet the prospector had the right to go within its limits and locate veins found therein. The decision of the court in this case is the first instance of record of any tribunal deciding the contrary.

Both cases cited in the opinion of the court were upon identically the same facts as those presented in the case at bar. It will take but a few moments to demonstrate this assertion beyond controversy. We will first call attention to the case of the Mt. Rosa Company *v.* Palmer. We understand the court to make a distinction between the Mt. Rosa case and the case at bar. It is contended in the opinion of the court in the case at bar that the lodes mentioned in the Mt. Rosa case were known to exist at the time the Mt. Rosa placer was located, and it is said that a prospector can only go within an existing placer location and locate lodes which are known to exist. In the Mt. Rosa case as a matter of fact, the lodes were not known to exist at the time the placer was located, or even at the time the lode claims themselves were located. We quote the following from Mr. Justice Goddard's opinion in that case:

144 "This is an action instituted by the appellee, plaintiff below, against appellant, The Mt. Rosa Mining, Milling and Land Company defendant below, to quiet his title to two lode mining claims situate within the exterior boundaries of a certain tract of land conveyed to appellant by a Government patent, as placer mining ground.

"Upon the trial it was admitted that the lode claims were formally and regularly located as provided by law, except as to the discovery of mineral therein; that affi*a*nts in lieu of labor, for the years subsequent to their location, were properly filed by the owners, that by

proper conveyances the plaintiff became, and was, the owner of whatever title had been acquired by virtue of such locations.

"It was further agreed that the placer owned by the defendant was located some time prior to the location of the lode claims; that the application for a patent was not made until after their location; that the defendant, through proper conveyances, was the owner of the placer.

"The only question of fact that remained in dispute *were* whether or not a vein or lode was discovered and known to exist in the Handy Andy and Newman claims, within the boundaries of the Mt. Rosa placer at the time appellant applied for patent for such placer, on August 18, 1892."

It will be seen from this quotation that it was admitted that lode claims were located within the limits of the Mt. Rosa placer, before any lodes were discovered within the limits of the lode locations.

The lode claims were formally and regularly located, except
145 as to the discovery of mineral therein. This is a most important exception, and utterly destroys any distinction between that case and the one at bar. The only question of fact in the Mt. Rosa case was, whether between the date of the location of the lode claims and the date of the application for a patent upon the placer, mineral was discovered and known to exist in the claims. We submit that if this court or any court can draw the slightest distinction between the facts in that case, and the case at bar, we would like to have it do so.

In the case at bar, the Searl placer was located in 1877, and the lode claims in controversy were located in 1890. In 1893 the lode claims applied for patent and were adversed by the placer location. If an adverse proceeding can be termed an application for a patent, then this was the time at which the question of the known or unknown character of the lodes was to be determined. In the Mt. Rosa case the Mt. Rosa placer was located and shortly afterwards the Handy Andy and Newman were located within its limits, but upon no known lodes. Before the placer applied for a patent, however, the owners of the lode claims discovered veins within their limits. We have therefore this remarkable condition that in two cases with almost identical facts this court holding in one case that a placer is entitled to the ground and in the other that the lode claimants are entitled to the ground. We submit, that to make their decisions consistent, and to mete out justice to all suitors alike, the opinion heretofore announced in this case should be withdrawn, and the same ruling laid down that was announced in the Mt. Rosa case.

146 Turning to the Aurora Lode case, we find the same condition of affairs to exist. The court says that the department decided in the Aurora Lode case that the location of a placer claim does not operate to give the right of possession to "*known*" veins or lodes within its limits, or preclude the right of *discovery* of such lodes by others. We would like the court to point out any place in that decision where the word "known" is inserted before veins or lodes

as stated in the opinion of this court. The first paragraph of the syllabus reads as follows:

"The discovery and location of a placer mining claim establishes in the owner the right to the possession of the superficial area within its boundaries for all purposes connected with and incident to the use and operation of the same as a placer mining claim; such location, however, does not operate to give title or right of *possession to veins or lodes* within its limits or preclude the right of *discovery and location* thereof by others."

We have underscored that portion of the syllabus where the word "known" ought to be, if it was ever used in the connection suggested by this court. No such word as "known" is there to be found. We quote the following:

"(1.) As to the effect of the placer locations:

"In your decision of April 1, 1896, you hold in substance that such a location gives to the locators or claimants under it a right to all veins or lodes included within its boundaries, though not claimed as such, or even discovered at the time; and that such right in the placer claimant can not be affected by any subsequent discovery or location by another, of a lode claim within the
147 boundaries of the placer claim. In other words, a placer claim, once lawfully located distinctively as such, gives to the owner thereof the right to appropriate to his own use and benefit any lodes or veins of mineral bearing ores, which may thereafter be discovered and located by another within the limits of his claim; and all he will have to do in order to procure title to such subsequently discovered lodes or veins, in the discovery and location of which he took no part, would be to include them in his application for patent when filed, and pay the additional price per acre therefor as required by law. This I understand to be the logical effect of your said decision.

"It does not appear to me that such is the law. No case has been cited in which the precise question has been decided, nor am I aware of any.

"Under the mining laws of the United States property rights in veins or lodes containing mineral bearing ores are acquired in the first instance by discovery and location. It has frequently been held by the courts that a mining claim once perfected under the law of discovery and location, becomes property in the highest sense of that term (Sullivan *v.* Iron Silver Mining Company, 143 U. S., 431–434; Belk *v.* Meagher, 104 U. S., 279–283).

"That there can be no valid location of a mining claim without discovery to support it will hardly be questioned. And a location on account of the discovery of a vein or lode can only be made by the discoverer, or one claiming under him. If the title to the discovery falls, so must the location which rests upon it. But if the discoverer has himself perfected a valid location on account of his discovery, no one else can have the benefit of that location,
148 unless he should abandon his prior right (Gwillim *v.* Donnellan, 115 U. S., 45–50).

"It is also to be remembered that the two classes of mineral deposits, namely, vein or lode deposits, and placer deposits, may exist in the same superficial area, and that they may be discovered, located and claimed by the same, or different persons, and patented accordingly. This is not only in accord with the plain import of the statute (sec. 2333 R. S.), but is also well settled by both judicial and departmental decisions (Reynolds *v.* Iron Silver Mining Co., 116 U. S., 687–697; South Star Lode, 20 L. D., 204). The said two classes of mineral deposits are entirely separate and distinct from and exist wholly independently of each other. The mining statutes appear to be founded upon the well known and universally recognized difference in their character. The vein or lode of mineral bearing quartz is more valuable than the surface and placer deposits, and Congress has accordingly fixed the price per acre, as represented by the superficial area, of the former at $5.00 per acre, and of the latter but $2.50 per acre. This was stated in substance by the Supreme Court in the case of Reynolds *v.* Iron Silver Mining Co. just cited, wherein the court also said it had been shown by experience that both these classes of mineral deposits might be found in the same superficial area, and that § 2333 of the Revised Statutes makes provision for such a case. That section is as follows:

"'Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein
149 or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in § 2320 is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim, but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

"This section, as was stated by the Supreme Court in the case of Noyes *v.* Mantle, 127 U. S. 348–352, and in other cases both prior and subsequent thereto, makes provision for three classes as follows:

"1. When one applies for a placer patent, who is at the time in the possession of a vein or lode included within the placer boundaries, he must state the fact and then, upon payment of $5.00 per acre for such vein or lode claim and 25 feet of surface on each side thereof, and $2.50 per acre for the placer claim, a patent will issue to him covering both the placer claim and the lode.

"2. Where a vein or lode is known to exist at the time within the boundaries of the placer claim, an application for patent
150 for the latter which does not include an application for the vein or lode will be construed as a conclusive declaration that the placer claimant has no right of possession to the vein or lode.

"3. Where the existence of a vein or lode in a placer claim is not known at the time of the application for patent, title will be conveyed by such patent to all veins or lodes within its boundaries.

"The present case, if the allegations of the protest by Bennett are true, would seem to come within the second of the three classes named, if within any of them. Certainly it does not belong to either of the other two. The original locators of the placer claims, assuming the allegations in the protest to be true, were not at the date of the placer locations in the possession of the vein or lode, and did not by their said locations lay any claim thereto. Theirs were distinctively placer locations. They could not have had any just claim to the lode because, as we have seen, they were not the discoverers thereof, and could not therefore lawfully locate it, or assert any property rights in it. The lode claim was discovered by others; was located by others; and upon its location, as property under the law, belonged to others. Nor was the present placer claimant in possession thereof at the date of his application for patent, at which time and long prior thereto, the existence of the vein or lode within the limits of the placer locations, was a well known fact.

"But whether this case comes wholly within the said second class or not, as to which more will be said when we come to consider the next question raised by the appeal, it cannot longer be doubted that the question as to whether lodes or veins of mineral bearing quartz pass under a patent covering a placer claim (is to be deter-
151 mined by the fact of the known or unknown existence of such veins or lodes at the date of the application for patent by the placer claimant, and not at the date of the location of his claim). If at that date the veins or lodes were known to exist and were not included in the application for patent, no title to them can pass by the patent; if not known to exist at that date, the placer patent will carry the title to them (South Star lode, *supra*, and cases cited).

"This being the settled law, both by departmental construction and judicial decision, as is also, as we have seen, that a mining claim, once discovered and duly located becomes the property of the discoverer or locator, and in further view of the fact, as well as the settled law, that both placer and lode claims may and do exist within the same superficial area, and may be located by and patented to different owners, it would be strange indeed if a placer location can, as such, operate either to withdraw from subsequent discovery and location any lodes or veins within its boundaries by any one other than the placer claimant, or to appropriate the benefit of such discovery and location or made by another to the use and benefit of the placer claimant. This would give to the placer location an effect, in my judgment not contemplated by the mining laws. Such

a location, in and of itself, does not establish any right in the claimant under it to the superficial area within its boundaries except as a placer claim or mine. Of its own force, it cannot operate to give title to or property rights in any veins or lodes within its boundaries. (True, a placer mining claim becomes property as such by discovery and location the same as a vein or lode claim, but it cannot and does not of itself in any sense give title to or property rights
152 in veins or lodes, nor can it, in my judgment, operate to preclude a subsequent lawful discovery and location of veins or lodes within its boundaries.)

"If the contrary were the law, the more valuable of the two classes of mineral deposits, entirely separate and distinct from each other, but frequently existing in the same superficial area, as we have seen, might be absolutely withdrawn from exploration and purchase, by a location covering a claim to the less valuable, or in cases like the present one, the effect would be to give to the locators of claims of the latter class all rights attaching by the discovery and location of claims of the former class, which are held to be property rights in the highest sense of that term. I cannot believe such is the law, and my conclusions, therefore, upon this branch of the case, are:

"'That while the discovery and location of a placer mining claim establishes in the owner the right to the possession of the superficial area within its boundaries for all purposes connected with and incident to the use and operation of the same as a placer mining claim, such location does not operate to give title or right of possession to veins or lodes within its limits, or preclude the right of discovery and location thereof by others.'"

Aurora Lode *v.* Bulger Hill and Nugget Gulch Placer, 23 L. D. 95.

We most respectfully and earnestly ask this court to point out in this language any such use of the word "known" as claimed in the opinion of this court in the case at bar. One paragraph of the above quotation was cited with approval by this court in the Mt. Rosa case, and the court also cites with approval § 413 of Mr.
153 Lindley on Mines. If there is any tendency direct or remote in either of these authorities to sustain the position reached by this court in the case at bar, we are willing to abandon this petition for rehearing at this point and say nothing more. But the court will see how distinctly over and over again the Secretary of the Interior says, that a placer location does not confer any right of any nature or description to veins or lodes included within its boundaries, and that said veins and lodes are still open to exploration, discovery and location by others than the placer locators. All three words, exploration, discovery and location are distinctly and emphatically used by the Secretary in his opinion. The Land Department expressly denied the right of the placer claimant to the lodes, because he had never discovered them, and had never located them. The same rule is applicable to the case at bar. The owners of the Searl placer never discovered these lodes, never located them

and does not now even claim in his pleadings in this case, any title to these lodes. That portion of the opinion of the Secretary quoted by this court in the Mt. Rosa case, says that a placer location does not operate to preclude a subsequent and lawful discovery and location of the veins or lodes by others within its boundaries.

Is there any question in the case at bar as to there being a lawful discovery and location of the four lode claims? In other words, this court in the Mt. Rosa case has said that a person may go within the limits of a placer location and discover and locate a vein. In the case at bar it takes away this dearest privilege of the miner, namely, that of discovering a lode, and simply says that he may locate a lode which has already been discovered. The whole
154 position of the court in the case at bar is inconsistent with and diametrically opposed to everything it has ever said upon this subject.

But what right has the court to say, under the record in this case, the locators of the lode claims did not locate the same upon known lodes? The court says that the evidence was not brought up in the bill of exceptions. We insist that under all proper rules for preparing bills of exception the evidence is all in the bill. The bill of exceptions gives the substance of the testimony that was offered and then says that the foregoing was in substance all of the testimony introduced in behalf of either side. Under the adjudications it is always the better practice, and the judge ought not to sign a bill of exceptions unless the evidence is condensed in this way.

Caldwell *v.* Parks, 50 Calif. 502;
Harvey *v.* Vande Mark, 71 Ills. 117;
Grissell *v.* Flower Feed Co. 36 N. E. Rep. 452;
Tyree *v.* Parham, 66 Ala. 424;
Cohen *v.* Wallace, 107 Calif. 133;
Karasich *v.* Hasbrouck, 28 Wis. 569.

In the case at bar there was no controversy upon the question of the existence of these lodes. By looking at pages — to — the court will see what testimony of the witnesses consist of. The plaintiff introduced evidence tending to prove the location of this placer claim. The defendants introduced evidence showing that the ground was not placer and then proved the location of its lode claims, and in addition to that gave testimony to the effect that these lodes were known to exist in 1880 and 1881. Not a word of testimony was introduced by the plaintiff in rebuttal to counteract this evidence.

When we turn to the pleadings we find that the plaintiff sets up title to the ground in controversy as a placer claim. The
155 defendant denies that it is a valid placer claim and alleges the lode locations, and that they were made upon known lodes. In reply the plaintiff denies not only that these were known lodes, but denies most emphatically the existence of any lode within the ground at all. The trial court in its findings finds in so many words that the defendants have discovered and located valid lode

claims. That is to say, upon the issues as framed by the pleadings the issue as to the existence of lodes within this ground has been decided against the plaintiff. The court below made no finding as to when these lodes were first known to exist, but the evidence is that they were known to exist in 1880 and 1881, and defendants are entitled to the presumption that they were known to exist previous to the date of location. In an adverse suit both parties are plaintiffs, and an appellate court must indulge the same presumptions for both that it does for one. The defendant asserted title to the ground by virtue of lode locations. The court found that it had located upon the lodes. The statute provides that there must be a lode before a location. We are therefore entitled to the presumption even though there had been no evidence upon the subject, that these lodes were known to exist at the date of their location. We call the court's attention especially to the following testimony found upon pages — and — of the transcript:

"The defendant to maintain the issues upon his part, then had sworn as witnesses John McNulty, A. C. Saltzman, Frank Fox, J. Lowney, Thomas J. Rinker, J. H. Reed, Duncan McClelland, Joseph Doyle, William Emery, Robert Berry, and Timothy Kay. These witnesses testified that they had each examined or watched
156 others examine the ground in question from two to three hours each, or longer; that the surface of said ground was covered with wash or debris; that in washing or panning said ground only colors had been found; some of said witnesses testified that said ground was not placer ground, and in their opinion could not be made to pay as placer ground; and the defendant also had sworn as witnesses J. W. Newall, Joseph Doyle, and J. K. Carleton, who testified that they had been familiar with the ground since 1880, and that since that time valuable lode deposits had been discovered and known in the region in which this placer is located, and the said J. K. Carleton testified that he believed that there was one large mineral bearing vein which underlaid the whole of said placer, dipping under the same; that he knew of evidences of said vein extending under said placer from workings in the Lucy B. Hussey and other lodes as far back as 1881; and said Newell, Doyle and Carleton testified that said lode or vein has, since 1895, been traced and discovered under said placer. Said witness together with S. M. Carleton, also testified to the discovery and location of the Castle, Clipper, Congress and Capital Lode mining claims; that said claims were located on the 25th of November, 1890; and said Carletons testified that at that time the said mineral bearing vein was known to underlie said placer."

We also ask the court to note in the pleadings that the plaintiff denies *in toto* the existence of any lodes within the ground at any time. In other words, the plaintiff is relying solely upon the proposition that this is placer ground, pure and simple, and never was and never can be anything else. So that the actual evidence and the presumptions of law which the court must make both lead to

the conclusion that these lodes were known to exist long prior to their location.

157 The court in the conclusion of its opinion attempts to escape from the dilemma to which the other portions of the opinion leads it, that unless the placer owner has abandoned his claim, waives the trespass or by his conduct is estopped to complain of it, a third party cannot enter the claim and discover a lode existing therein. We would most respectfully ask the court what it means by waiving a trespass or conduct that will estop the placer claimant from complaining? The record in this case shows that these lodes were located in 1890. That thousands upon thousands of dollars were expended in the succeeding years for their development. That they were made into productive mines. That not one word of protest was ever uttered by the placer claimant, and not until three years after the location when a patent was applied for by the lode claimants, did any objection come from the owners of this so-called placer. If this is not an estoppel, we do not understand the meaning of these terms. But let us suppose that the placer claimant did notify the lode claimant not to prospect upon his placer ground, and expressly in so many words objected to the trespass, yet notwithstanding these facts, the prospector does uncover a few inches of soil of the placer and discloses a lode which he proceeds to work and locates. He continues to work it for three years, and then applies to the Government for a patent. The placer claimant has never asked for a patent. The lode has been discovered within the limits of his placer claim and is known to exist. The lode has been so known for three years. The placer claimant has never attempted to locate it or assert any title to it in any way, shape or form, except by claiming the ground during all of the time as a placer claim as against the lode claimant, would

158 not this be a complete waiver of any rights to the lode? It is conceded by this court, at least, it is conceded by its written opinions in the past, that no title comes to a known lode within a placer claim except by location thereof; but here a lode has been known to exist for three years, and the placer claimant has made no location of it, can he assert any title to that lode as against any one who has made a location thereof?

The court concedes even in the opinion in this case that the lode may be located by a third party when it is ascertained that it is in existence, although it denies that it may be discovered by a third party. Suppose the discovery to be a trespass and the original location unlawful, if no claim to the lode is made by the placer claimant within a reasonable time, is not this a complete and final waiver on the part of the placer claimant of the lode?

We presume that this court will follow the Mt. Rosa case to the extent at least to say that if the Searl placer had applied for a patent in 1892 without including these known lodes or saying anything about them, that it would have waived its right to claim them. Could it be denied in this event that the owners of the placer had abandoned or waived any right to claim these lodes?

We would most respectfully ask, Do the owners of a placer acquire any greater rights by not asking the Government for a patent? In other words, is a possessory title stronger and better than a patent title and can there be any more of a waiver or abandonment of the lodes by a failure to locate or claim them, than by applying for a patent, and failing to claim them in the application.

159 It is settled law that a title to a known lode can only be obtained by a location of the same as a lode. These lodes even under the reasoning of this court were certainly known to exist when discovered, and they were discovered certainly in 1890, even though their discovery could be deemed a technical trespass. What title then had the Searl placer to them in 1893, when it filed its suit, in 1898 when the same was tried, or in 1901 when it was passed upon by this court? What vestige of a right under any law, decision or ruling has the Searl placer to claim one ounce of ore extracted from any of these lodes? What can be termed a waiver if the history of this case does not show that the owners of the Searl placer have waived their rights to these lodes?

This case goes even beyond this. Plaintiffs have virtually filed a disclaimer as to these lodes. They have denied their existence in their solemn pleadings. They have no pleading and no evidence in this case that entitles them to claim these lodes or ask a judgment for them. We submit that under the facts the pleadings and the evidence the owners of the Searl placer cannot now and could not when the suit was filed deny the right of the locators of the Clipper to locate the lodes.

We submit for the reasons given above it is the duty of the court to grant our petition, and order a rehearing where all of these matters can be discussed at length.

Respectfully submitted,

THOMAS, BRYANT & LEE,
*Attorneys for Plaintiff in Error.*

160 And thereupon, and on to-wit, March 3, A. D. 1902, the following order denying said petition for rehearing was entered by the supreme court:

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| THE CLIPPER MINING COMPANY, Plaintiff in Error, v. THE ELI MINING AND LAND COMPANY, A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray, Defendants in Error. | 4115. Error to District Court of Lake County. |

At this 3d day of March, A. D. 1902, upon consideration thereof, it is ordered by the court that the petition of plaintiff in error to file a supplemental transcript be and the same is hereby denied. And it is further ordered by the court that the petition of plaintiff in error for rehearing herein be and the same is hereby denied. And let the opinion of the court filed herein be recorded.

Which opinion is in words and figures as follows, to-wit:

161 No. 4115.

On application to file supplemental transcript and on petition for rehearing.

Chief Justice CAMPBELL delivered the opinion of the court.

1. After the petition of plaintiff in error for a rehearing was presented, it asked leave to file a supplemental record to bring up proceedings in the district court which occurred subsequent to final judgment, in which, for the first time, alleged errors of that tribunal are called to our attention.

These proceedings were attacked by motions below upon which the rulings were against plaintiff in error. The objections and exceptions thereto were not preserved by a bill, as required by our practice, and for this reason alone they might now be disregarded. But, in addition to this, some of the matters embodied in the supplemental transcript were within the knowledge of plaintiff in error at, and prior to, the trial below, and all of them before the original bill of exceptions was approved and signed by the trial judge, and long before the original transcript was lodged in this court. They were, therefore, as well known to plaintiff in error before the cause was argued and submitted in this court, and before the original opinion was handed down, as they were when this application was made. It is clear that the request should be denied. Our practice precludes a party, upon a petition for a rehearing, to raise new questions.

Lamar Co. *v.* Amity Co., 26 Colo. 370;
Orman *v.* Ryan, 25 Colo. 383;
Water Co. *v.* Irrigation Co., 24 Colo. 322.

162 2. The petition for a rehearing is based upon three propositions: (*a*) The court erred in holding that the Secretary of the Interior in the matter of the protest against Searl's application for a patent did not decide that the ground was not placer ground, and that said judgment of the Land Department was not conclusive; (*b*) there was error in holding that, as matter of fact, the evidence in the court below did not show that the lode claims located by the plaintiff in error were known lodes at the time of the location, and that there was further error in holding that a lode location cannot be made within the limits of an existing placer location except upon a known lode or vein; (*c*) the court misconstrued the effect of the decisions in the cases of *Aurora Lode v. Bulger Hill and Nugget Gulch Placer*, 23 L. D., 95; and *The Mt. Rosa M. M. & L. Co. v. Palmer*, 26 Colo., 56.

(*a.*) We can add nothing under this head to what is contained in the foregoing opinion. No authority is cited and no argument now made which were not before us upon the original hearing. The authorities already referred to clearly refute the position of plaintiff in error. The decision of the Land Department in the case at bar

was precisely the same in principle as that considered in the case of *Beals v. Cone, supra;* and plaintiff in error concedes that if this court still adheres to the doctrine of that case, as it does, the present contention falls.

In this connection we may add that, if the position of plaintiff in error is sound, it has no standing in this court; for the first decision ever made by the Land Department with respect to the mineral character of the Searl placer was in favor of the placer claimant in a contest between him and a town site claimant. See 7 Copp's
163 Land-owner, 36. Such being the first decision of the Land Department, if, as plaintiff in error contends, it is *res adjudicata* as to the mineral character of the placer claim, the controversy is ended, and plaintiff in error cannot reopen that question.

(*b.*) Where in the original opinion it is intimated that plaintiff in error admits that the trial court rightly determined that the Searl placer was an existing valid location at the time of the attempted location of the lode claims, it was not our intention to say that the admission was voluntary, but only that the finding having been made upon conflicting evidence, under the established rule in this jurisdiction the plaintiff in error, as well as the court, for the purposes of this review, is concluded by it. The transcript does not purport to contain all of the evidence. The abstract recites that certain evidence was introduced in behalf of the plaintiffs tending to establish their cause of action, and certain other testimony in behalf of the defendant to establish its defences. In such circumstances, we cannot investigate to ascertain on which side the preponderance of the evidence is. Indeed, there has never been any serious contention that the findings of fact of the trial court were not sustained by the evidence.

In the case of *The Fanny Rawlings M. Co. v. Tribe, ante* p. —, decided at this term, it was said, "Appellate courts must assume, in the absence of specific and unambiguous findings of fact to the contrary, that the lower court intended to find those facts which are responsive to the issues made by the pleadings, and essential to the judgment rendered." Let this rule be applied to the case at bar.

The defendant alleged and the plaintiffs denied, that the lode
164 claims were known to exist before application for a placer patent. The findings were that the locators of the lode claim had not the right to go upon the territory included within the placer location for the purpose of prospecting and locating lodes. Possibly, we have not hitherto made sufficiently prominent the fact that a patent for the placer was applied for long before an attempt was made to locate the lode claims, the original application in the year 1878 or 1879, the exact date being immaterial. An amended application was made in the year 1882, which was rejected by the Secretary of the Interior in November, 1890, and it was not until after this last date that the locators of the lode claims made an entry upon the placer location.

It may be true, as counsel for plaintiff in error says, that a belief existed in Leadville that this Territory was underlaid with mineral,

but, so far as we are able to determine, there does not seem to have been any knowledge of that fact, so far as the territory in controversy is concerned, until after the entry by defendant's grantors. At all events, the application for a placer patent was made eleven or twelve years before the alleged right to the lode claims was initiated. Before it can be said that a lode is known to exist, there must be actual knowledge, as distinguished from supposition or surmise. *Sullivan v. Iron Silver M. Co.*, 143 U. S. 431. And in order to uphold the judgment we shall assume, as very properly we may, that the trial court, as a matter of fact, found that the lodes were not known to exist until after the application for a patent was made. Indeed, we do not see what other finding could possibly be made when it is considered that the locators of the lode claims did not enter upon
165 the placer claim to prospect until years after its owners had applied for a patent. And for aught that appears to the contrary—which is the contention of defendants in error in argument—the lodes may have been discovered and their existence thus first become known only by sinking a shaft to a depth of several hundred feet beneath the surface, and that the entry by the lode locators was forcible and against the will of the placer claimant.

(c.) Counsel insists that we have misconstrued the decisions in the cases of the Aurora Lode and the Mt. Rosa Company, upon which we commented in the former opinion. We have given attentive consideration to their argument in that behalf and after carefully re-reading the opinions are satisfied that we have not misconceived their effect. In the syllabus of the Aurora case it is said that the location of a mining claim "does not operate to give title or right of possession to veins or lodes within its limits, or preclude the right of discovery and location thereof by others." This language seems to be taken substantially from what is said in the opinion of the Secretary of the Interior at page 101 of the official report. The statement, removed from its proper setting, may be broad enough to include unknown, as well as known, veins or lodes; but considered, as it should be, in connection with the context, it is clear that the Secretary intended it to apply only to known lodes, for he expressly says, in speaking of the general rule, if the veins or lodes were "not known to exist at that date (*i. e.*, when patent for placer claim is applied for), the placer patent will carry the title to them."
166 This can mean nothing else than that, if lodes or veins are not known to exist within the limits of a placer location at the time when patent for the latter is applied for, they belong to the placer claimant, and one may not thereafter make an entry upon the placer claim for the purpose of discovering and locating them. But if the decision of the Secretary of the Interior in this case can, by any canons of construction, be considered authority for the contention of the plaintiff in error here that a prospector may, without restriction, within the limits of a prior valid placer claim prospect for, and thereafter lawfully locate, lodes not known to exist at the time of the application for a placer patent, its binding effect would seem to be overcome by the decision of the Supreme Court of the

United States in *Bennett v. Harkrader*, 158 U. S. 441, and in many other decisions of that and other courts.

The learned counsel for plaintiff in error were permitted, *amici curiæ*, to file a brief in the Mt. Rosa case, and we then had the benefit of their learning and research, and the record in the case at bar was before us when that opinion was prepared by Mr. Justice Goddard. It was with full knowled[illegible] of the issues herein and as particularly applicable to the arg[illegible]nt of this plaintiff in error made in that case, which is the same as it is here, that the following language found on page 61 was used:

"While we recognize to its full extent the rule that precludes the initiation of a right through a trespass upon the lawful possession of another, we think, under the established facts in this case, appellant is not in a position to invoke its protection. The lodes in question were known to exist prior to the application for patent; and appellant, not having taken the necessary steps to obtain them, they were open to location by others at the time they were located
167 by the grantors of appellee. In making the locations, no right of appellant was invaded, and their validity, therefore, is in no way affected by the fact that they were made within the surface boundaries of a prior placer location."

We then had in mind, as we do now, the distinction between the facts of that case and the case at bar. There it was unquestioned that the lode claims were known to exist within the limits of the placer location before an application for patent for the latter was made. In the case at bar, as we have seen, the findings of fact of the trial court, which upon this review are conclusive upon us, are that the lode claims were not known to exist until long after the application for the placer patent was filed. The distinction is vital and the rule in the two cases is different.

In *Del Monte M. & M. Co. v. Last Chance M. & M. Co.*, 171 U. S., 55, the court, in making answer to questions certified to it by the United States circuit court of appeals of the eighth circuit, said that "the lines of a junior lode location may be laid within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location under-ground or extra-lateral rights not in conflict with any rights of the senior location." And this answer, plaintiff in error now contends, is authority for its contention to which we have just referred. With this we cannot agree. Mr. Justice Brewer, who wrote the opinion in that case, expressly recognizes the fact that no rights can be initiated as the result of a trespass, and on page 79 of the opinion says that the form in which the question is put excludes any impairment or disturbance of the substantial rights of the prior locator; and he quotes with
168 approval the statement from 1 Lindley on Mines, section 363, that "A subsequent locator may not invade the surface territory of his neighbors and include within his boundaries any part of a prior valid and subsisting location. But conflicts of surface area are more than frequent." While the learned judge was speaking of lode claims, the principle is just as applicable to a placer claim to

the extent of the surface rights which belong to it. So long, therefore, as lode claims are not known to exist within the limits of the prior placer claim at or before the time of the application for placer patent, it is unlawful for one to go within its limits for the purpose of prospecting for, and with the hope of discovering and locating, them.

The application to file a supplemental record and the petition for a rehearing are each denied.

Mr. Justice Steele dissents.

169 I, Horace G. Clark, clerk of the supreme court of the State of Colorado, do hereby certify, that the foregoing is a true copy of an original opinion of the supreme court of the State of Colorado, filed in the above entitled cause on the 3d day of March, A. D. 1902, and of the order of the court denying said motion to file supplemental transcript and also said motion for rehearing, now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office in the city of Denver, this 26th day of March, A. D. 1902.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,
*Clerk Supreme Court,*
By —— ——, *Deputy.*

170 *Certificate to Transcript of Record.*

UNITED STATES OF AMERICA, }
*District of Colorado, State of Colorado,* } *ss:*

I, Horace G. Clark, clerk of the supreme court of the State of Colorado, in the United States of America, do hereby certify, that the foregoing pages, numbered in folios from 1 to 450, inclusive, contain a true and complete transcript of the record and proceedings had in said cause, in the case of The Clipper Mining Company, plaintiff in error, *vs.* The Eli Mining and Land Company, A. D. Searl, F. C. Schroeder, A. F. Britton and H. J. Gray, defendants in error, No. 4115, as the same remain of record on file in my office.

In witness whereof, I have caused the seal of the said court to be hereunto affixed, at the city of Denver, in the district and State of Colorado, this 26th day of March, in the year of our Lord 1902, and of the Independence of the United States the one hundred and twenty-sixth.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,
*Clerk of the Supreme Court of the State of Colorado,*
By JOHN B. COOKE, *Deputy.*

Endorsed on cover: File No. 18,590. Colorado supreme court. Term No. 76. The Clipper Mining Company, plaintiff in error, *vs.* The Eli Mining and Land Company, A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray. Filed June 21st, 1902.

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Office Supreme Court U.S.
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JAMES H. McKENNEY,
Clerk.

# Supreme Court of the United States.

**OCTOBER TERM, 1903.**

*No. 76.*

THE CLIPPER MINING COMPANY, PLAINTIFF IN ERROR,

*vs.*

THE ELI MINING AND LAND COMPANY ET AL.

## MEMORANDUM.

TOWNSITE OF NORTH LEADVILLE VS. SEARL.

Where land in the vicinity of valuable mineral deposits is returned as mineral in character on the township plat, clear and positive proof of its non-mineral character can alone overcome the return of the Surveyor General.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *April* 17, 1880.

SIR: I have considered the case of The Townsite of North Leadville *vs.* A. D. Searl, *et al.*, involving certain tracts of

land in sections 23 and 24, town. 9 S., range 80 W., Leadville district, Colorado.

The only question at issue or raised, by the appeal, is, as to the character of the land, the townsite application being resisted on the ground that the tracts are valuable for minerals.

The undisputed facts are that the tracts were returned by the Surveyor General as mineral land, and that they are in the midst of, and in close proximity to, very valuable gold placers, and lode or carbonate mines producing silver.

But the testimony of witnesses who have worked or prospected the land for mineral, gold and silver, and who were introduced as expert miners, is conflicting. Some found gold in paying quantities, and unhesitatingly gave it as their opinion that the land is valuable for minerals and will pay well for mining purposes, while others failed to find such results or indications as to convince them that the tracts are valuable mineral land, and others unhesitatingly say that they have no value whatever for mining by any known process.

That the land contains valuable minerals hardly any one denies; but upon the question whether the minerals are in paying quantities, the opinions of the witnesses, based upon the results of actual prospecting and comparison of surface indications of those of the surrounding lands which are being profitably worked, are very conflicting; and the question arises whether the evidence is sufficient to overcome the presumption of the Surveyor General's return, and that raised by the fact of the proximity of known valuable mines. I think not.

After a consideration of all the testimony and of the arguments, both written and oral, I am of the opinion that the Surveyor General's return is not overcome by proof, and that the land should be held as valuable for minerals within the meaning of section 2318, of the U. S. Revised Statutes.

Your decision dismissing the application of the county judge to enter the tract as a townsite, and sustaining the Surveyor General's return, is affirmed.

C. SCHURZ, *Secretary.*

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

*7th Copp's Landowner*, p. 36.

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# In the Supreme Court of the United States.

Supreme Court U.S.
FILED
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Clerk.

OCTOBER TERM, 190

*No. 76.*

THE CLIPPER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE ELI MINING & LAND COMPANY, ET AL.,
DEFENDANTS IN ERROR.

*Error to the Supreme Court of the State of Colorado.*

## BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

C. S. THOMAS,
W. H. BRYANT,
H. H. LEE,
Attorneys for Plaintiff in Error.

# In the Supreme Court of the United States.

October Term, 1903.

*No. 76.*

THE CLIPPER MINING COMPANY, Plaintiff in Error,

*vs.*

THE ELI MINING & LAND COMPANY, et Al.,
Defendants in Error.

*Error to the Supreme Court of the State of Colorado.*

## BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

### I.

### STATEMENT OF CASE.

This case is the culmination of a long series of events. On December 14, 1877, A. D., Searl and seven associates made a location of placer land near the new mining camp of Leadville. We will refer to this location as the Searl placer. The claim embraced at this time about 152 acres of land. The original locators

shortly conveyed all their interest to A. D. Searl, who applied for a patent from the local land office on July 5, 1878. The great mining camp of Leadville had in the meantime become fully established, and the lode character of all its mineral lands fully demonstrated, and Mr. Searl was met in the land office with a multitude of adverse claims filed by the owners of conflicting lode locations. As a result of this, various settlements were made, numerous lode claims were excluded, and on March 10, 1882, an amended application for patent was filed, excluding over one-third of the land originally located. The new application was for 101.916 acres. Over one-third of the land was thus conceded to be more valuable for lode than placer purposes, almost at the inception of the claim.

The amended application of March 10, 1882, was met by a number of protests filed in the land office by citizens of Leadville. The ground of these protests was that the location itself was illegal and void, because the land upon which the *placer claim* was located was not *placer land*, and could not be located as such. It was insisted that the land was more valuable for lode mining than for placer mining, and that Searl was endeavoring to acquire title to valuable mining ground under the guise of a placer claim, when it was really intended for townsite purposes or for lode mining claims. The rapidly growing city of Leadville had already overrun a large part of the location. These protests were investigated by the land office, hearings were ordered and had, and all were sustained. The register and receiver of Leadville decided that the location was void because made on land that was not placer in character. This decision was

affirmed by the commissioner of the general land office on March 6, 1886, and the decision of the commissioner was affirmed by the secretary of the interior on November 12, 1890.

It was supposed, of course, the proper authorities having decided that the ground embraced in the limits of the Searl placer was *not placer ground* and could not be located as such, that it was open to location as *lode ground* or for any other purpose that might be found under the statutes of the United States. Accordingly on November 25, 1890, four lode claims, known as the Clipper, Castle, Congress and Capitol were located within the exterior boundaries of what had been known as the Searl placer. These four lode claims by divers mesne conveyances, became the property of the Clipper Mining Company, the plaintiff in error in this suit, and form the subject matter of this litigation. Work was prosecuted upon said lode claims; and they were soon found to be very valuable, and many thousands of dollars were taken from them. The plaintiff in error, as owner of the lode claims, applied to the land office for a patent, and on November 23, 1893, the defendants in error filed an adverse claim as the owners of the old pretended Searl placer. The complaint will be found beginning on page 16 of the printed transcript. It simply set up title to the ground in conflict as a *placer location* pure and simple.

The defendant answered, setting up as its main defenses, *first*, that the action of the land department in holding the land not to be placer ground and not subject to patent as such, was an adjudication binding on everyone; *second*, that the defendant had en-

tered upon the ground in controversy, and located the lode claim upon veins of mineral in rock in places that were known to exist, and *third,* that as a matter of fact the ground in dispute was not placer ground. A demurrer was filed to the first two defenses and thoroughly argued before Hon. M. S. Bailey, one of the district judges of the District Court of Colorado, and by him overruled. The case then came on for trial before Hon. T. A. Rucker, another district judge, and he found the facts to be that a valid placer location had been made and a lode or vein discovered within it and properly located, and gave judgment on the law for the plaintiffs. In rendering his opinion, the judge said he had decided another case on the same facts the other way (Transcript, page 65). The case was taken to the Supreme Court of Colorado, and the judgment of the lower court was affirmed, Mr. Justice Steele dissenting. Upon the law points involved, then, so far as the state courts are concerned, we have one *nisi prius* judge and one justice of the Supreme Court who have sustained the contention of the plaintiff in error, two justices of the Supreme Court the contention of the defendants in error, and one nisi prius judge who has in two cases decided for both parties. This is about as equal a division of sentiment as could be obtained from five judges.

As a part of the transaction, we would call attention to the fate of the balance of the Searl placer as determined in the federal courts and in the land office. Several other lode locations were made within the limits of the so-called Searl placer, and the adverse suits that arose out of them were all tried in the United States Circuit Court for the district of Colo-

rado. Some came before Judge Hallett and some before Judge Riner, and one went to the Circuit Court of Appeals for the Eighth circuit. Both Judges Hallett and Riner and the Circuit Court of Appeals sustained the contention of the plaintiff in error in this case. And in a proceeding in the land office, the commissioner of the general land office and the secretary of the interior both reached the same conclusion. All of the lodes have gone to patent and the placer title held void in every instance.

So that the matter under consideration in this cause has been before the state courts, the United States courts and the department of the interior. The view of the plaintiff in error has been sustained by the United States courts, the department of the interior, and one-half the judges of the state courts. The view of the defendants in error has been sustained by one-half the state court judges, and by them alone. Unfortunately for us, the half of the state court judges consisted of two out of the three judges of the Supreme Court, and we have been compelled to sue out this writ of error.

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## II.

## SPECIFICATION OF ERRORS.

Numerous assignments of error have been filed in this case, but they can all be disposed of by a discussion of these three propositions:

First—Can a citizen of the United States enter the limits of a valid placer location held by possessory title only, and discover and locate a lode found

to be actually existing therein, and not claimed and located by the locator of the placer?

Second—Can a placer claimant file an adverse claim or sustain an adverse suit against the application of the owner of a lode claim for a patent?

Third—Is a decision of the land department of the United States binding upon other tribunals, or can courts re-litigate and determine the same matter in a subsequent proceeding?

Some minor matters can be disposed of incidentally in the discussions of these two propositions.

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## III.

## ARGUMENT.

### FIRST.

*Can a citizen of the United States enter the limits of a valid placer location held by possessory title only, and discover and locate a lode found to be actually existing therein and not claimed or located by the locator of the placer.*

This question has been answered in the affirmative by every court that has passed upon it except the Supreme Court of Colorado, in the case at bar. The Supreme Court of Colorado in an earlier case answered in the affirmative, and in the case at bar was divided in opinion. All text writers have likewise answered in the affirmative. Mr. Morrison, who has issued a new edition of his valuable work upon Mining Rights, since the opinion in this case was published, is

very emphatic in his dissent from its conclusions. He says:

> "But in Colorado the sweeping decision, Steele J. dissenting, has been made that the placer location holds all lodes not known to exist at the time of the location. That no prospector can enter to search for them and that if he does so enter and discover a lode he can not locate it because his location was initiated by trespass.
>
> Clipper Co. vs. Eli Co., 68 Pac., 286.
>
> "This practically gives all lodes to the placer owner and clearly defeats the intent of the act of Congress. The question seems to us more analogous to the case where one owns the surface and another the minerals, in which instance it is universally held that the surface may be entered upon and used to the full extent necessary to find and win the mineral values."
>
> Morrison's Mining Rights (11th edition), page 207.

That the question is squarely involved will be seen from a brief examination of the record. The complaint begins on page 16, folio 30, and simply sets up title in the plaintiffs to a *placer claim*. The answer begins on page 20, folio 37, and expressly recites the finding of the lodes, the fact of their existence and their location within what was claimed to be the limits of the placer. The replication begins on page 29, folio 53, and expressly denies that any lodes

existed within the placer. So we have presented a plaintiff claiming solely upon a placer location, and not only claiming no lodes by location or otherwise, but denying their existence. The court upon these issues found the facts against the plaintiff, and that the lodes, as a matter of fact existed, but as a matter of law, that the defendants could not locate them within the placer. In other words, the question under discussion was answered in the negative. The bill of exceptions is short and commences on page 38, folio 71. The evidence upon this point is contained on two pages. The plaintiffs simply introduced evidence as to the validity of their placer locations, the defendant rebutted this, and proved the discovery, existence and location of its lodes, and introduced the records of the land office to show the finding that the land was not placer. The plaintiff never denied any of these affirmative defenses that were proved. The finding of the court is on page 63, folio 121, of the record. That this issue is clearly presented is shown by the following quotation from the opinion of the Supreme Court:

> "The question, therefore, is presented whether, and if so, in what circumstances, one may, before application for a patent of a prior valid placer location is made, go upon the same for the purpose of prospecting the ground, and thereafter make a location of a lode claim based on a discovery thereafter, and thus made of a vein or lode therein."
>
> Transcript of Record, page 68, folio 131.

The court should understand that it is nowhere conceded that the Searl placer ever was for one moment a valid placer location. It is only stated that even though it were the best placer claim ever staked, yet it can not hold a lode or vein that has been discovered and located by another within its limits.

The general relation between lode and placer claimants has been very well discussed by nearly all of the text writers on mining law. We quote the following from Mr. Lindley:

> "That the two classes of mineral deposits, those falling within the designation of lodes, or veins, and those usually called placers, frequently exist in the same superficial area, is a matter of common experience.
>
> "That when so found, they may be held by the same or different persons, is well settled by both judicial and departmental decisions.
>
> "While it is undoubtedly true that a mining location, whether lode or placer, is property in the highest sense of the term, and when perfected, is equivalent to a grant from the government, yet it does not follow that the thing granted is the same in both classes of locations, nor that things reserved from the operation of one grant are likewise excepted from the operation of the other.
>
> "There is a marked distinction between the surface rights acquired by a lode location and those flowing from a placer location. In the former, there is a grant of the exclusive right of enjoyment of the surface and every-

thing within vertical planes drawn downward through the surface boundaries, subject only to the extralateral right of outside apex proprietors to pursue their veins underneath the surface. No subsequent locator, either lode or placer, can invade such surface, though he may openly and peaceably enter for the purpose of laying his lines in such a manner as to properly define his extralateral right. On the other hand, lodes found within the placer surface, or underneath it, if their existence is known prior to the application for placer patent, are not the subject of a placer grant. Therefore, the placer claimant may not own everything upon the surface or found within vertical planes drawn downward through the surface boundaries. The policy of the government with reference to lodes is to sever them from the body of the public lands, and to deal with them and the land immediately inclosing them as separate and distinct entities.

"The location of mining ground for placer purposes does not effect such severance. The placer claimant may, in the absence of a discovery and location by others, obtain the title to the lode, but he has not such right by virtue of his prior placer appropriation, unless the existence of the lode remains unknown until the application for a placer patent is filed. This right to appropriate the lode must flow from the discovery of the lode. Whosoever first discovers the

lode may appropriate it by complying with the laws conferring privileges upon such discoverers. If he fails to do so, it is open to the next comer, and this rule applies to the placer claimant as well as to strangers. If, having discovered it, he fails to manifest his intention to claim it by appropriating it under the lode laws, it may be the subject of appropriation by others, the same as if it were on the public domain; provided, always, that such appropriation is made and perfected peaceably and in good faith. In this respect, the same rules of law which govern the location of mineral land occupied or claimed by others under inchoate agricultural holdings are to be applied. We have fully discussed this subject in preceding articles. It is unnecessary to here repeat what is there said."

1 Lindley on Mines, Sec. 413 (2d Ed.).

Mr. Snyder, in his late work, states the same proposition as undoubted law:

"The statute has recognized what the experience of the miner has proved, that it not infrequently occurs that a placer claim may also contain a lode within its boundaries. In such case, each should be located by itself, a separate estate being created in each. The location of a placer claim carries with it no rights to a lode existing therein and known to exist at any time before patent. The lode so existing may be claimed and lo-

cated either by the placer claimant himself or by another locator. Therefore, where such lode is known to exist within the boundaries of the placer at the date of its location, or at such subsequent date as it is discovered, the placer claimant should, in order to protect his rights, if he desires to hold such lode, at once locate and mark the boundaries thereof, as in the case of any other lode location. Failure on his part to do this leaves the lode subject to location by another, regardless of the possession of the placer within which it is contained."

1 Snyder on Mines, Sec. 318.

And Mr. Morrison, in all the various editions of his standard work, has laid down the same rule. In the last, or eleventh, edition we find the statement:

"A lode claim covers the entire surface as well as the veins within it. Before the passage of the mining acts, it had been held (Brown vs. 49 Co., 9 M. R., 600) that a lode location also included float gold below its apex, which had evidently come from that particular vein. It is evident, from the congressional grant of the surface without excepting any form of deposit, that a lode location, made in good faith, upon an ore-producing vein, without the aid of any such decision, would include placer deposits within its lines, both above and below the vein.

"But an unpatented placer claim covers no lodes, and a lode claim may be located

across it. An unpatented mill site, or ranch claim, does not include either veins or deposits of gold or silver. If the holder of such claim discover mineral upon it he should stake and record the same as a mining claim, and he has the same right as a stranger so to do, if he be the first to disclose such mineral value."

Morrison's Mining Rights, page 225 (11th Ed.).

The relations between lode and placer claims can, perhaps, be better understood by taking up the various acts of Congress dealing with them. It will be seen from them, we think, beyond controversy, that lodes are the highest form of property known in the mining law, and may be discovered and located at any time in land that is the property of the United States.

Prior to 1866 the location of mineral lodes belonging to the United States was governed by the local rules and customs of miners. All were trespassers upon lands of the government and subject to its mercy or justice when it chose to act. On July 26, 1866, Congress declared its intentions by passing a crude act that recognized the rights of these trespassers. The act was devoted exclusively to the subject of locating and patenting *lodes or veins of quartz or other rock in place.* Not one word was said with reference to placer locations. This class of claims still existed, if at all, by sufferance. In the eye of the law, the only mineral lands that could be located and patented were

those containing lodes in rock in place. Section 1 of the act provided:

> "That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be provided by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

The remaining ten sections regulated *lode* locations and patents and water rights.

On July 9, 1870, the act was amended by adding to it six new sections, the first two of which introduced placer claims into the law for the first time. Section 12 of the amended act, which was the first section of the new act, started off as follows:

> "And, be it further enacted, that claims usually called 'placers,' including all forms of deposit, excepting veins of quartz or other rock in place, shall be subject to entry and patent under this act, under like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims."

We thus have Congress recognizing lode claims as the standard and afterwards permitting other mineral

lands to be patented in the same way. The court will note the careful language of the above statute. "All forms of deposit, *excepting veins of quartz or other rock in place*" are subject to entry and patent. Veins in rock in place are expressly excepted as a higher and more valuable property right, one that can not be entered or patented under the guise of a claim usually called placer. The court will note that no permission is given to *locate* a placer, but only to enter and patent a placer claim. By implication, the right to locate must exist and must be governed by local law.

Congress proceeded cautiously. In 1872 it amended the mining code by practically re-enacting the laws of 1866 and 1870, with some new changes and important additions. Lode claims still continue to be the standard in most important matters, but placers were also looked after and lodes within placers remembered. Experience had shown that lodes frequently existed within placer claims, and so provision was made for this contingency.

Section one of the new act contained a valuable suggestion of greater wisdom on the part of Congress, and a more accurate use of language. It read:

> "That all valuable mineral deposits in land belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens," etc.

The court will note that "all valuable mineral deposits in *lands belonging to the United States*" are

declared open to *exploration and purchase*. Under the same section of the act of 1866 it was simply declared that mineral lands of the United States were open to *exploration and occupation*. By the new law, as long as the title to land remained in the United States it was open to exploration and purchase for valuable mineral deposits. Until the United States had parted with its title any citizen was free to explore its lands for these valuable deposits, subject only to the provisions of that chapter. What were those provisions?

Section two regulated the size and location of lode claims. Section three opened with the new and significant language:

> "That the locators of *all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge*, situated on the public domain, where no adverse claim exists at the passage of this act, so long as they comply with the laws of the United States and the state, territorial or local regulations, not in conflict with said laws of the United States, governing their possessory title, *shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins*," etc.

Here was a new and valuable right conferred. Prior thereto only the *lode* had been granted, and the surface ground carried with it only an easement and other lodes within it were still open to exploration.

But Congress was careful to confine this to *lode locations*. The law may be searched in vain for any statute giving to placer locators this right of exclusive possession.

Section 10 of the new act begins with this provision:

> "That the act entitled 'An act to amend an act granting the right of way to ditch and canal owners over the public lands, and for other purposes,' approved July ninth, eighteen hundred and seventy, shall be and remain in full force, except as to the proceedings to obtain a patent, which shall be similar to the proceedings prescribed by sections six and seven of this act for obtaining patents to vein or lode claims."

That is, while new and important changes were being made as to lode locations, their size increased, surface ground added and exclusive possession and absolute title conferred, placer claims remained as they were. They continued "claims usually called placers," and included only "all forms of deposit excepting veins of quartz or other rock in place."

But the next section provided

> "that where the same person, association or corporation is in *possession of a placer claim, and also a vein or lode included within the boundaries thereof,*"

application must be made for each class of ground. This language shows as clearly as words can show

that the possession of the placer claim did not carry with it possession of a vein or lode within its boundaries. The applicant must *also* be in possession of such lode. There can be no possession of a vein or lode without a location. The same person, then, must have a location of each to be in such possession. The language is meaningless unless we give it this construction. A vein or lode is so valuable in the eye of the law that the location of other classes of mining claims does not necessarily carry its possession.

We ask the court carefully to read these various statutes. All of the provisions show that veins or lodes of quartz or other rock in place are the subject of special provisions, the most valuable deposits in the eye of the law, always open to exploration, location and purchase, as long as the land belongs to the United States, and that locations of the same are made superior to all other kinds of locations made.

It follows from the statutes that a lode mining claim can be located within the limits of any inferior class of locations at any time while the legal title to the ground covered by such inferior locations is still in the United States, although a quasi possessory title may be in some individual.

We will call atttention to a number of decisions upon several classes of locations made upon the public domain. We presume that a homestead is, perhaps, as sacred a title as any known to the law, and that a person going on the public domain and attempting to locate a homestead and acquire title thereto will be given every protection that the law can afford; and yet it has always been the rule that wherever a homestead was located upon land which turned out

to contain valuable deposits of mineral any time before patent had been issued to the homestead claimant, that any one discovering such valuable deposits of mineral could locate the same and acquire thereby a better title than that possessed by the homesteader. In other words, since the land attempted to be taken by the homesteader was not agricultural in its character, the person locating the homestead acquired no rights thereto; his possession was in the nature of an illegal possession and could be invaded by any one showing a superior right thereto. The land office will protect such homestead claimant until a hearing is had to determine the title to the land, and if it is determined that it is mineral ground, the locator of the mining claim will be given a preference and the land decreed to him.

Kaweah Colony, 12 Land Decisions, 326.
1 Lindley on Mines, section 202 and following.

Again, lands embraced within an inhabited city or town and occupied as residences should receive whatever protection the law throws around it; yet this court has held that wherever land is included within the limits of an incorporated town which is found to be mineral in its character, at any time before patent finally issues, it may be located as mineral land. The following emphatic language was indulged in:

> "To such claims, though within the limits of what may be termed the site of the settlement or new town, the miner acquires

as good a right as though his *discovery* was in a wilderness."

Steel vs. St. Louis Smelting Co., 106 U. S., 447.

In other words, although a lode or other deposit of mineral may be discovered within the exterior boundaries of a town site, if the title to such ground is still in the United States, the location can be made. And in a later case it was held that even though the land was actually occupied for trade and business, and improvements had been made thereon, the discoverer of a vein of mineral had the right to locate the same, secure a patent thereto, and was not compelled to pay anything for the improvements thereon. In that case the court used this significant language:

"It is upon the alleged prior occupation of it for trade and business, the same being within the settlement or town site of Deadwood, that the defendant relies as giving him a better right to the property. But the title to the land being in the United States, its occupation for trade or business did not and could not initiate any right to it, the same being mineral land, nor delay proceedings for the acquisition of the title under the laws providing for the sale of lands of that character."

Deffeback vs. Hawke, 115 U. S., 392.

And the Supreme Courts of Montana and Arizona and the land office have uniformly held to the

same effect and permitted mining locations to be made on property which had been improved and was actually occupied.

Talbot vs. King, 6 Montana, 76.

Butte City Smokehouse Lode Cases, 6 Montana, 397.

Chambers vs. Jones, 17 Mont., 156.

Tombstone Townsite Cases, 15 Pac. Rep., 26.

In re Rankin, 7 Land Decisions, 411.

And see the very able discussion on this point in 1 Lindley on Mines, section 166, and following.

A railroad grant having been construed by this court to convey no mineral rights, it has always been held that so long as a patent has not been actually issued, the lands are open for exploration for minerals, and all mineral *discovered* subject to location. This rule has been enforced, even where the grant itself was held to convey the title and although the railroad company was exercising ownership over the land and had attempted to sell it to other parties.

Barden vs. Northern Pas. Rd. Co., 154 U. S., 288.

The right to peaceable exploration and discovery always existed. Lands, the legal title to which was in the United States, could be entered for this purpose, hence possessory title did not withdraw the lands from such exploration and discovery.

Indeed, this was regarded as elementary in mining law until the decision of the Supreme Court of

Colorado in the case at bar. The court here attempts to draw a fine-spun scholastic distinction on the word *discovery.* It concedes that a person may go within a placer claim and *locate* a vein, but he can not go and *discover* a vein. We must confess that the distinction is beyond our comprehension, and insist that it is unworthy the court that makes it. If this ruling stands, it deprives the prospector of his dearest right, namely, that of discovering a new mine. It attempts to put a placer location upon the same footing with a lode location. No one is permitted to enter its limits except the owner, and land once located is forever withdrawn from the public domain. As Mr. Morrison well says, *supra,* this "clearly defeats the intention of the act of Congress."

It was never contended that a prospector could make a forcible entry within the limits of a placer claim. No title could be initiated in this manner. But the evidence here shows the entry to have been peaceable, and the location made according to law. We quote the following from the bill of exceptions upon this point:

> "The defendant, to maintain the issues upon its part, then had sworn as witnesses John McNulty, A. C. Saltzman, Frank Fox, J. Lowney, Thomas J. Rinker, J. H. Reed, Duncan McClelland, Joseph Doyle, William Emery, Robert Berry and Timothy Kay. These witnesses testified that they had each examined, or watched others examine, the ground in question from two to three hours each or longer; that the surface of said

ground was covered with wash and debris; that in washing or panning said ground only colors had been found; some of said witnesses testified that said ground was not placer ground, and in their opinion could not be made to pay as placer ground; others of said witnesses testified that they could not express an opinion as to whether said ground was placer ground or not; and the defendant also had sworn as witnesses J. W. Newell, Joseph Doyle, J. K. Carleton, who testified that they had been familiar with the ground since 1880, and that since that time valuable lode deposits had been discovered and known in the region in which this placer is located, and the said J. K. Carleton testified that he believed that there was one large mineral-bearing vein which underlaid the whole of said placer, dipping under the same, that he knew of evidences of said vein extending under said placer from workings in the Lucy B. Hussey and other lodes as far back as 1881; and said Newell, Doyle and Carleton testified that said lode or vein had, since 1895, been traced and discovered under said placer. Said witnesses, together with S. M. Carleton, also testified to the discovery and location of the Castle, Clipper, Congress and Capital lode mining claims; that said claims were located on the 25th of November, 1890; and said Carletons testified that at that time the said mineral-bearing vein was known to underlie said placer; and said Newell testified

that to his knowledge a valuable discovery of mineral in said lodes was made in 1895; and said three witnesses testified that said claims had all had work performed upon them in the shape of a shaft sunk to the said mineral-bearing vein, from which a great many thousand dollars' worth of ore had been extracted and shipped to the smelter; that the discovery shafts had been sunk upon each of said claims, the boundaries had been marked, the location certificates had been prepared and filed as required by the statutes of the state of Colorado, and that the statutes of the said state and of the United States relating to the discovery, location, recording and annual work upon each of said claims had been in all things fully complied with."

Transcript of Record, page 39.

Not one word was introduced to rebut this evidence. The trial court in its finding simply states that the defendants entered the placer claim and discovered a lode claim. This implies that the discovery was made in a legal and peaceable manner. The evidence just quoted shows the defendants were in the uninterrupted possession of the lode claims for years, that they expended thousands of dollars in their development and extracted thousands of dollars of ore from the veins themselves. Now at this late day they are told that, although the placer claimants always denied the existence of the lodes, and do not now claim them as lodes, yet because they originally entered upon a placer claim their location is void. We

submit that such a conclusion is monstrous. It finds no sanction in the mining law.

Many of these conflicts between lode and placer claims have been before this court. In all of them it has been conceded that a lode claim could be located within a placer claim before the latter had applied for a patent. This was the one point upon which all parties seemed to agree. A brief examination of the cases will demonstrate this beyond question.

The first case was that of The Iron Silver Mining Company vs. Sullivan. It came up first on the circuit before Judge McCrary on a demurrer to the answer. The owners of the placer sued in ejectment, and the defendant replied that he was working a lode known to exist when application was made for a patent on the placer. The plaintiff demurred to the answer and insisted that the defendant should have said he had *discovered* his lode and gone within the placer and located it before the placer applied for a patent, and that it was not enough merely to allege that the lode was known to exist. We quote from Judge McCrary's opinion the following:

> "Now, it is a vein or lode such as is described in this section 2320 that is referred to in the provision of section 2333 that I have read, and which we are now to consider. We are referred to section 2320 for a description of a vein or lode, which is referred to in the section under consideration, and we see in reading that section that it describes the location, the metes and bounds, the size, and generally describes, not the lode simply, but a lode claim—one that has been located, which

has boundaries, which has been developed; it gives us its dimensions; it declares it shall have been located; it says it shall be a claim in which there has been a discovery of mineral, etc.

"I am of the opinion that a vein or lode that has never been claimed; that has not been located; that has not been marked out by metes and bounds, and in which there has been no actual development, or, to use the language of the statute, 'discovery of a vein or lode within the limits of the claim located,' is not a vein or lode such as is described in section 2320. The description must refer to these things. The section describes nothing else, and to its description we are plainly referred."

Iron Silver Mining Co. vs. Sullivan,
16 Fed. Rep., 829.

It will be seen from this that even the placer claimant conceded the right to enter a mere possessory placer location and locate a lode claim before the placer had applied for a patent. This was regarded as settled law in the mining states and territories and has been acted upon from that good day to this.

Judge McCrary's decision was reversed by this court upon a construction of the language of the answer and without passing upon the merits of the point involved.

Sullivan vs. Iron Silver Mining Company,
109 U. S., 550.

From that time a long and bitter litigation waged between the owners of the Iron Silver Mining Company and various lode claimants. Several of the cases came before this court:

Reynolds vs. Iron Silver Mining Company, 116 U. S., 687.

Iron Silver Mining Company vs. Reynolds, 124 U. S., 374.

United States vs. Iron Silver Mining Company, 128 U. S., 673.

Iron Silver Mining Company vs. Campbell, 135 U. S., 286.

Iron Silver Mining Company vs. Mike & Starr Co., 143 U. S., 394.

Sullivan vs. Iron Silver Mining Company, 143 U. S., 431.

In all of the cases it was never doubted that the position we here contend for was correct. It was the position insisted upon by the placer owners; it was conceded by the lode owners as far as it went. The law was finally and definitely settled in the Mike and Starr cases, decided in 143 U. S. That was a controversy between the Iron Silver Company as the owner of a placer claim and the Mike and Starr Company as the owner of a lode claim called the Goodell. The Goodell lode claim was located after the placer had applied for a patent. The Goodell was held a good location because upon a lode actually known to exist at the time the placer applied for a patent. The contention of the placer people was that in addition to being known, the lode should have been actually

located. We call attention to the following extract from the dissenting opinion of Mr. Justice Field upon this point:

> "At the close of the testimony in the case the plaintiff moved the court to instruct the jury to find a verdict in its favor, on the grounds, among others, that the Goodell claim of the defendant was not located or recorded until after the application was made for the patent of the William Moyer placer claim, and that there had not been a discovery in the shafts of the defendant of any vein or lode of quartz or other rock in place bearing any valuable deposits. But the court denies this motion, and to its denial exception was taken.
>
> "Among the instructions to the jury the plaintiff then requested the court to give the following:
>
> "1. That the terms 'vein or lode' and 'vein or lode claim,' as used in section 2333 of the Revised Statutes of the United States, mean and refer to vein or lode mining claims which have been discovered, located and recorded within the boundaries of a placer claim before the time when the application is made for the placer patent. And unless the jury find from the evidence that the alleged Goodell lode claim of defendant had been discovered, located and recorded in accordance with the law governing the location and acquiring title to mining claims before the time when the application was made for the said

placer patent, the said lode claim is not excepted or excluded from the grant of the said placer patent, and does not come within the reservation clause in said patent.

"2. That a lode claim located or attempted to be located within the exterior boundaries of a placer claim at any time after the time of making application for the patent to the placer claim gives no right or title; any lode so located is not reserved from the grant of the placer patent. This rule applies to all lode claims located between the time of the application for the placer patent and the making of the entry and the issuing of the patent.

"3. That to constitute a valid title to a lode mining claim the locators of such claim are required to make a discovery of a vein, lode or ledge carrying valuable deposits, within the boundaries of such lode claim, before the same is located and recorded, and if such discovery is not made the location is void and creates no title or right of possession in the attempted locators; and if the said defendants made no such discovery of a vein, or lode, or valuable deposit within the boundaries of the said Goodell lode claim, then they acquired no title or right to possession whatever by virtue of their pretended location.

"But the court refused to give either of these instructions, and to its refusal to each one an exception was taken at the time."

Iron Silver Mining Company vs. Mike & Starr Co., 143 U. S., 394.

And we also quote the following from Mr. Justice Brewer to show that it was conceded that our contention was elementary law:

> "Our conclusions are, first, in respect to the matter of the known vein, that the reasons so clearly stated by Mr. Justice Field, speaking for the court in the case of Noyes vs. Mantle, 127 U. S., 348, 353, are unanswerable, and forbid an adjudication that the term 'known vein' is to be taken as synonymous with 'located vein,' and compel a reiteration of the declaration heretofore made, that the term refers to a vein or lode whose existence is known, as contradistinguished from one which has been appropriated by location; and as to the other matter, that the title to portions of this horizontal vein or deposit, 'blanket' vein as it is generally called, may be acquired under the sections concerning veins, lodes, etc."
>
> Iron Silver Mining Company vs. Mike & Starr Co., 143 U. S., 394.

It would be a queer result to hold that an unpatented placer claim conferred greater rights than a patented placer claim, and yet this is the logical result of the decision of the court below. The decisions of this court just cited show that even after a placer claim has gone to patent, a stranger may enter its limit and locate a lode that was known to exist when the patent was applied for. In the case at bar, the placer claimant has no application for a patent, has made no location of the lodes, and in its pleading, de-

nies their existence, and yet the court below takes them away from parties who have actually discovered them, proved their existence and located them according to law. Such another result can not be found in the books.

The conclusions of the text writers and of this court are supported by the decisions of the department of the interior and of other courts. Secretary Smith, in an elaborate opinion, uses this language:

> "As to the effect of the placer locations:
>
> "In your said decision of April 1, 1896, you hold in substance that such a location gives to the locators or claimants under it a right to all veins or lodes included within its boundaries, though not claimed as such, or even discovered at the time; and that such right in the placer claimant can not be affected by any subsequent discovery or location by another, of a lode claim within the boundaries of the placer claim. In other words, a placer claim, once lawfully located distinctively as such, gives to the owner thereof the right to appropriate to his own use and benefit any lodes or veins of mineral-bearing ores, which may thereafter be discovered and located by another within the limits of his claim; and all he will have to do in order to procure title to such subsequently discovered lodes or veins, in the discovery and location of which he took no part, would be to include them in his application for patent when filed, and pay the

additional price per acre therefor as required by law. This I understand to be the logical effect of your said decision.

"It does not appear to me that such is the law. No case has been cited in which the precise question has been decided, nor am I aware of any.

"Under the mining laws of the United States property rights in veins or lodes containing mineral-bearing ores are acquired, in the first instance, by discovery and location. It has frequently been held by the courts that a mining claim, once perfected under the law by discovery and location, becomes property in the highest sense of that term. (Sullivan vs. Iron Silver Mining Company, 143 U. S., 431-434; Belk vs. Meagher, 104 U. S., 279-283.)

"That there can be no valid location of a mining claim without discovery to support it will hardly be questioned. *And a location on account of the discovery of a vein or lode can only be made by the discoverer, or one claiming under him.* If the title to the discovery falls, so must the location which rests upon it. But, if the discoverer has himself perfected a valid location on account of his discovery, no one else can have the benefit of that location, unless he should abandon his prior right. (Gwillim vs. Donnellan, 115 U. S., 45-50.)

"It is also to be remembered that the two classes of mineral deposits, namely, vein or

lode deposits, and placer deposits, may exist in the same superficial area, and that they may be discovered, located and claimed by the same, or different persons, and patented accordingly. This is not only in accord with the plain import of the statute (section 2333 R. S.), but is also well settled by both judicial and departmental decisions (Reynolds vs. Iron Silver Mining Company, 116 U. S., 687-697; South Star Lode, 20 L. D., 204). The said two classes of mineral deposits are entirely separate and distinct from, and exist wholly independently of, each other. The mining statutes appear to be founded upon the well-known and universally recognized difference in their character. The vein or lode of mineral-bearing quartz is more valuable than the surface and placer deposits, and Congress has accordingly fixed the price per acre, as represented by the superficial area, of the former at $5.00 per acre, and the latter but $2.50 per acre. This was stated in substance by the Supreme Court in the case of Reynolds vs. Iron Silver Mining Company, just cited, wherein the court also said it had been shown by experience that both these classes of mineral deposits might be found in the same superficial area, and that section 2333 of the Revised Statutes makes provision for such a case. That section is as follows:

"'Where the same person, association or corporation is in possession of a placer claim, and also a vein or lode included within the

boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of $5.00 per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode such as is described in section 2320, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim, which does not include an application for a vein or lode claim, shall be construed as a conclusive declaration and the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.'

"This section, as was stated by the Supreme Court in the case of Noyes vs. Mantle, 127 U. S., 348-352, and in other cases, both prior and subsequent thereto, makes provision for three classes, as follows:

"1. When one applies for a placer patent, who is at the time in possession of a vein

or lode included within the placer boundaries, he must state the fact, and then, upon payment of $5.00 per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof, and $2.50 per acre for the placer claim, a patent will issue to him covering both the placer claim and the lode.

"2. Where a vein or lode is known to exist at the time within the boundaries of the placer claim, an application for patent for the latter, which does not include an application for the vein or lode, will be construed as a conclusive declaration that the placer claimant has no right of possession to the vein or lode.

"3. Where the existence of a vein or lode in a placer claim is not known at the time of the application for patent, title will be conveyed by such patent to all veins or lodes within its boundaries.

"The present case, if the allegations of the protest filed by Bennett are true, would seem to come within the second of the three classes named, if within any of them. Certainly it does not belong to either of the other two. The original locators of the placer claims, assuming the allegations in the protest to be true, were not, at the date of the placer locations, in possession of the vein or lode, and did not, by their said locations, lay any claim thereto. Theirs were distinctively placer locations. They could not have had any just claim to the lode because, as we

have seen, they were not the discoverers thereof, and could not, therefore, lawfully locate it, or assert any property rights in it. The lode claim was discovered by others; was located by others; and, upon its location, as property under the law, belonged to others. Nor was the present placer claimant in possession thereof at the date of his application for patent, at which time, and long prior thereto, the existence of the vein or lode within the limits of the placer locations, was a well-known fact."

Aurora Lode vs. Bulger Hill and Nugget Gulch Placer, 23 L. D., 95.

A rehearing was denied and the rule affirmed by Secretary Francis.

Same Case, 23 L. D., 348.

The Supreme Court of Montana has announced the same rule in one of its early decisions. We quote the following:

"There is no proof whatever that the respondent was in possession of a vein or lode within the boundaries of his placer application. There is no proof that any such vein or lode existed. The discovery of the Betsey Dahl lode two or three hundred feet outside of such boundaries raises no presumption of the possession of a vein or lode by the respondent within the boundaries of his placer claim. *If said discovery had been*

*within said boundaries, and in pursuance thereof a lode claim had been properly located there,* then the respondent, in making application for a placer patent, would have been presumed to know of the existence of such lode or vein."

Raunheim vs. Dahl, 6 Mont., 167.

The case was affirmed by this court.

Raunheim vs. Dahl, 132 U. S., 260.

And the Supreme Court of South Dakota has decided the exact point.

McCarthy vs. Speed, 11 South Dak., 362.

Indeed, the Supreme Court of Colorado has decided the point, and in favor of the contention of plaintiffs in error, as we view it.

The Mt. Rosa M. M. & L. Co. vs. Palmer, 26 Colo., 56.

In the case at bar the Supreme Court of Colorado filed two opinions, one on the original hearing and one on rehearing. Our objections to the original opinion were so strong that the court shifted its ground in its opinion on rehearing. In the first opinion it stated the proposition under discussion as though no application for a patent were made by the owners of the placer. In the opinion on rehearing it took refuge behind the abandoned and rejected applications for patent made by the owners of the Searl placer. This is clearly a confession of weakness on the part of the court. We would ask this court to read that portion

of the opinion on rehearing, beginning at folio 164, page 85, of the record. This taking up of a matter never urged even by counsel for defendants in error to sustain a conclusion so at variance with reason and authority should of itself work a reversal of the case. The patent application that the court refers to was rejected by the land department as fraudulent and void. Can such an application be held to be the basis of any rights for the placer claimant? The owners of the placer, in their pleadings or briefs, never predicated any rights upon this fact. The land department, in one of its decisions in this case, expressly held that all that was left to the placer owners was their possessory right growing out of what was left of their location.

> In re Clipper Mining Company, 22 Land Dec., 527.

The Supreme Court of Colorado in this case never thought of this matter in its original opinion. The chief justice, in folio 131, on page 69 of the record, uses this language:

> "The question, therefore, is presented whether, and if so, in what circumstances, one may, *before application for a patent* of a prior valid placer location is made, go," etc.

To fix the date at which a lode must become known to exist or else pass to the placer owner, we must have an application for a patent that is successful. Applying for a patent, and having your application refused, can confer no rights at all. The placer

owners here have never insisted upon any other rights than those of mere holders of a possessory title. No wonder when his colleagues were forced to rely upon this weak support one of the judges of the Supreme Court dissented.

The land department, since the rejection of the application for patent, treats the claim as though no application had been made. While this cause has been pending in the courts, each side has endeavored to secure an entry from the land department. In passing on the attempt of the placer locators, the commissioner of the general land office said:

> "There was only one question before the court, the question of the right of possession to the ground involved, and the court found this to be in the placer claimants, not because they had any right to the lode claims, but upon the new and novel ground that the lode claimants had no right to enter upon the placer location. It is not necessary to the decision in this case to consider the effect of this, the first decision of the courts denying any right to lode locators within the limits of a mere unapplied for placer location, a decision at total variance with the practice or rulings of this office and the land department."

And the secretary of the interior, in affirming this judgment, said:

> "Your office decision of December 20, 1898, considered these entry proceedings and

held that in the adverse claim filed in the local office and in their pleadings in the adverse suit, the adverse claimants rested their right to the land in controversy solely upon their alleged placer claim, and asserted that there were no known veins or lodes therein; and the judgment in the adverse suit awarded said land to them as a part of said placer claim, and not otherwise; that such judgment did not establish in them any right to make a lode entry or receive a lode patent, and that the lode entry should be cancelled as wholly unauthorized. From this decision Searl and his associates, the adverse claimants, have appealed to the department.

"The decision of your office was clearly correct and is therefore affirmed."

Clipper Mining Company vs. Eli M. & M. Co., 29 L. D., 137.

Judge Hallett, in passing upon these same rejected applications, stated both the law and the position of the placer claimants in very clear language. He said:

"No. 3292 is an action of ejectment to recover possession of a mining claim in Lake county, called the Jason lode. The defendant in one answer set up title to what is known as the Searl placer, the defendant being the lessee of the owners of that placer. The plaintiff replied that, upon proceedings in the land office, by which the

owners of the placer claim sought to obtain a patent for the premises, the placer claim was decided to be invalid. The defendant has demurred to this replication, and relies upon the proposition that whatever may have taken place in the land office, the placer claim is still a good location in so far as to enable the defendant to maintain possession of the premises, and to resist any location which may have been made by the plaintiff or any other person on the placer claim. I think this position is untenable. When the placer location was held to be invalid in the land office, it was thereupon void for all purposes; the premises covered by the placer location were public land, and no further proceedings could be had upon that location; the plaintiff, and everyone else, was at liberty to go upon the premises and make another placer location, or a lode location, as they might find the facts to be. This is a question which admits of extensive discussion, and I do not think it necessary to go into it at this time."

The mere statement of the proposition, however, is sufficient. An application for a patent that is rejected as void becomes nothing, and can date no rights from its filing. A reading of section 2333 of the Revised Statutes will convince any one that this must be true. The patent must actually issue to fix these rights, and when issued, it dates back to the application. But the peculiar circumstances under which the court changed its base is sufficient upon this point.

It is not an unusual thing to have a right to enter upon mining land in the possession of third parties for the purpose of securing title under other provisions of the mining law. Lode claims come nearer to exemption than any other class of mining property, because the statute expressly gives exclusive possession. But, even in this case, this court has expressly decided that the lines of a junior location may be run across it and stakes placed upon its surface to secure underground rights.

Del Monte Mining Co. vs. Last Chance Mining Co., 171 U. S., 55.

We would like to incorporate in this brief the entire opinion of Mr. Justice Brewer upon the first point discussed in that case, but will content ourselves with part.

> "The stress of the argument in favor of a negative answer to this question lies in the contention that, by the terms of the statute, exclusive possessory rights are granted to the locator. Section 2322 declares that the locators 'shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location,' and negatively that 'nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.' Hence, it is said that affirmatively and negatively, it is provided that the locator shall have exclusive

possession of the surface, and that no one shall have a right to disturb him in such possession. How, then, it is asked, can any one have a right to enter upon such location for the purpose of making a second location? If he does so he is a trespasser, and it can not be presumed that Congress intended that any rights should be created by trespass.

"We are not disposed to undervalue the force of this argument, and yet are constrained to hold that it is not controlling. It must be borne in mind that the location is the initial step taken by the locator to indicate the place and extent of the surface which he desires to acquire. It is a means of giving notice. That which is located is called, in section 2320 and elsewhere, a 'claim,' or a 'mining claim.' Indeed, the words 'claim' and 'location' are used interchangeably. This location does not come at the end of the proceedings, to define that which has been acquired after all contests have been adjudicated. The location, the mere making of a claim, works no injury to one who has acquired prior rights. Some confusion may arise when locations overlap each other and include the same ground, for then the matter of right becomes a matter of dispute, but no location creates a right superior to any previous valid location. And these possessory rights have always been recognized, and disputes concerning them settled in the courts..

"It will also be noticed that the locator is not compelled to follow the lines of the government surveys, or to make his location in any manner correspond to such surveys. The location may, indeed, antedate the public surveys, but, whether before or after them, the locator places his location where, in his judgment, it will cover the underlying vein. The law requires that the end lines of the claim shall be parallel. It will often happen that locations which do not overlap are so placed as to leave between them some irregular parcel of ground. Within that, it being no more than one locator is entitled to take, may be discovered a mineral vein, and the discoverer desire to take the entire surface, and yet it be impossible for him to do so and make his end lines parallel unless, for the mere purposes of location, he be permitted to place those end lines on territory already claimed by the prior locators.

"Again, the location upon the surface is not made with the view of getting benefits from the use of that surface. The purpose is to reach the vein which is hidden in the depths of the earth, and the location is made to measure rights beneath the surface. The area of surface is not the matter of moment; the thing of value is the hidden mineral below, and each locator ought to be entitled to make his location so as to reach as much of the unappropriated, and perhaps only partially discovered and traced vein, as is possible.

"Further, Congress has not prescribed how the location shall be made. It has simply provided that it 'must be distinctly marked on the ground so that its boundaries can be readily traced,' leaving the details, the manner of marking, to be settled by the regulations of each mining district. Whether such location shall be made by stone posts at the four corners, or by simply wooden stakes, or how many such posts or stakes shall be placed along the sides and ends of the location, or what other matter of detail must be pursued in order to perfect a location, is left to the varying judgments of the mining districts. Such locations, such markings on the ground, are not always made by experienced surveyors. Indeed, as a rule, it has been and was to be expected that such locations and markings would be made by the miners themselves—men inexperienced in the matter of surveying—and so in the nature of things, there must frequently be disputes as to whether any particular location was sufficiently and distinctly marked on the surface of the ground. Especially is this true in localities where the ground is wooded or broken. In such localities, the posts, stakes or other particular marks required by the rules and regulations of the mining district may be placed in and upon the ground, and yet, owing to the fact that it is densely wooded, or that it is very broken,

such marks may not be perceived by the new locator, and his own location marked on the ground in ignorance of any prior claim. And in all places posts, stakes or other monuments, although sufficient at first, and clearly visible, may be destroyed or removed, and nothing remain to indicate the boundaries of the prior location. Further, when any valuable vein has been discovered, naturally many locators hurry to seek, by early locations, to obtain some part of that vein, or to discover and appropriate other veins in that vicinity. Experience has shown that, around any new discovery, there quickly grows up what is called a mining camp, and the contiguous territory is prospected and locations are made in every direction. In the haste of such locations, the eagerness to get a prior right to a portion of what is supposed to be a valuable vein, it is not strange that many conflicting locations are made, and, indeed, in every mining camp where large discoveries have been made, locations, in fact, overlap each other again and again. (McEvoy vs. Hyman, 25 Fed. Rep., 596-600.) This confusion and conflict is something which must have been expected, foreseen—something which in the nature of things would happen—and the legislation of Congress must be interpreted in the light of such foreseen contingencies.

"Still again, while a location is required by the statute to be plainly marked on the

surface of the ground, it is also provided in section 2324 that, upon a failure to comply with certain named conditions, the claim or mine shall be open to relocation. Now, although a locator finds distinctly marked on the surface a location, it does not necessarily follow therefrom that the location is still valid and subsisting. On the contrary, the ground may be entirely free for him to make a location upon. The statute does not provide, and it can not be contemplated, that he is to wait until by judicial proceedings it has become established that the prior location is invalid or has failed before he may make a location. He ought to be at liberty to make his location at once, and thereafter, in the manner provided in the statute, litigate, if necessary, the validity of the other as well as that of his own location."

And again he says:

"The distinction thus suggested is pertinent here. A party who is in actual possession of a valid location may maintain that possession and exclude every one from trespassing thereon, and no one is at liberty to forcibly disturb his possession or enter upon the premises. At the same time, the fact is also to be recognized that these locations are generally made upon lands open, unenclosed and not subject to any full actual occupation, where the limits of possessory rights are vague and uncertain, and where the valid-

ity of apparent locations is unsettled and doubtful. Under those circumstances, it is not strange—on the contrary, it is something to be expected, and, as we have seen, is a common experience—that conflicting locations are made, one overlapping another, and sometimes the overlap repeated by many different locations. And while in the adjustment of those conflicts the rights of the first locator to the surface within his location, as well as to veins beneath his surface, must be secured and confirmed, why should a subsequent location be held absolutely void for all purposes and wholly ignored? Recognizing it so far as it establishes the fact that the second locator has made a claim, and in making that claim has located parallel end lines, deprives the first locator of nothing. Certainly, if the rights of the prior locator are not infringed upon, who is prejudiced by awarding to the second locator all the benefits which the statute gives to the making of a claim? To say that the subsequent locator must—when it appears that his lines are to any extent upon territory covered by a prior valid location—go through the form of making a relocation, simply works delay and may prevent him, as we have seen, from obtaining an amount of surface to which he is entitled, unless he abandons the underground and extralateral rights which are secured only by parallel end lines."

The point under discussion, of course, related to parallel end lines, but it is just as pertinent to the case at bar. A placer location simply confers the right of possession to *the placer ground* and confers no possession of the lode ground. The statute itself expressly excludes any other conclusion. Section 2333 says that

> "where the same person, association, or corporation *is in possession of a placer claim,* AND ALSO A VEIN OR LODE INCLUDED WITHIN THE BOUNDARIES THEREOF,"

there can be no escape from the conclusion that the mere possession of a placer claim confers no possession of a vein or lode; the locator of the placer must "ALSO" be in possession of the vein or lode. This lode or vein possession must come from location, as that is the only way under the law that possession can be secured.

And again, a patented lode claim may be entered by a tunnel claimant to secure and work a blind lode.

Campbell vs. Ellet, 167 U. S., 116.

All of the placer mining cases passed upon by this court are based upon this proposition.

In conclusion on this branch of the case, we can only say that the decision of one state court by a division of two judges against one should not be permitted to stand against the unanimous judgment of all the federal courts and the land department. It is not the construction of a state statute or a declaration of the common law as understood in that state. It is the interpretation of a federal law. We have al-

ready called attention to the decisions of the land department, and to Judge Hallett's opinion. Judge Riner's opinion, and the Court of Appeals affirming it, will be found in

Eli Mining & Land Co. vs. Carleton, 108 Fed. Rep., 24.

Surely all the courts and all the text writers can not be mistaken upon this point. Contemporaneous construction of the statute from its passage to this time must be right, unless clearly shown to be wrong. We submit that the position of the Supreme Court of Colorado is wrong upon this point.

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SECOND.

*Can a placer claimant file an adverse claim or sustain an adverse suit against the application of the owner of a lode claim for a patent?*

An answer to this question strikes at the very foundation of this case. It has been already decided by the land department in this identical litigation that the owners of the placer can not get a patent from the government for these *lodes*. What then can they get? The lodes are now known to exist. The owners of the placer even if given a patent for their placer could get no title to the lodes. Who, then, is entitled to the lode claims? These are questions that must be answered. The Supreme Court of Colorado has paid no attention to them. In the case at bar the plaintiffs not only never claimed the lodes in this suit, but have solemnly denied their existence. Now, then, can they dispute the right of another to them?

The court should have given judgment to the defendant on the pleadings, as was prayed for.

The rulings of the land office in this case have already been referred to. When judgment was entered in this cause by the District Court of Lake county the plaintiffs took a certified copy to the land office and had a receiver's receipt issued. This was contested in the general land office by the defendants and the entry was cancelled by the commissioner on Dec. 20, 1898, and this decision affirmed by the secretary of the interior. In his ruling cancelling the entry, the commissioner used this language:

> "There is only one possible way under the U. S. mining laws by which a placer applicant can secure title to known lodes within his placer claim and that is in the manner provided for in section 2333 U. S. R. S., by asserting claim to such lodes in his placer application.
>
> "But it is impossible under the proceedings taken in this case to assert any such claims to the lodes entered. They were not claimed in the placer application, either original or as amended, nor in the adverse suit nor in the judgment based thereon. It is extremely difficult, therefore, to determine by what construction of the mining laws such a claim as is here asserted can be made or defended.
>
> "The entire proceedings in this present case display a remarkable estimate of the purpose and scope of the mining laws by the entrymen. Their placer application for

patent, made without any claim to known lodes, was rejected because of the non-placer character of the land applied for. They proceed, however, to adverse the lode applications, and secure a judgment * * * because of the prior placer location. They now seek under cover of such judgment to secure patent for the lode claims which they denied ever existed. To admit such proceedings would be to place a violent and unwarranted construction on the meaning and purpose of the mining laws.

"The utmost liberality is allowed under said laws to persons seeking title to the public lands, so long as the claims thereto are in good faith and the land covered thereby is subject to disposition under the form of the laws applicable thereto, but there is no place in either the spirit or the letter of the law for cases of this kind. If there are also locations in such placers which are not claimed by placer applicants, it is a perfectly plain proposition that they should be held to be the property of the lode locators. This is the rule of the department and the courts, even including the court which decided this case, which, however, fails to distinguish between the two classes of mineral deposits, lode and placer, which are as sepaarte and distinct as are agricultural and mineral lands.

"However, enough has been stated to show that the entrymen have no right to the

> lode claims under the judgment, nor is the office called upon to consider at this time whether an entry can be made under said judgment for the placer claim. This involves the question of the character of the land, a question which is solely within the jurisdiction of the land department."

In affirming the commissioner, the secretary used the language quoted above from 29 L. D., 137. It was urged by the Clipper Company on that hearing that the land department should disregard the adverse proceedings and issue its patent to the lode claims, but it refused to pass upon the point at that time, leaving the matter entirely with the courts. It is now for this court to say.

An examination of the statutes will convince the court that we are right.

Sections 2325-6 of the Revised Statutes provide the method by which title to lode claims can be acquired. They were formerly sections 6 and 7 of the act of May 10, 1872, and these were substitutes for sections 2, 3, and 6 of the act of July 26, 1866. The act of 1866 related solely to lode claims, and did not permit a placer claimant to apply for a patent under any circumstances. It was not until 1870 that a placer claim was recognized by any act of Congress, and in 1872 the provisions of the act of 1870 were carried into the general mining act.

Lode claims were the only class mentioned under the act of 1866. It is clear, therefore, that the adverse claims contemplated could only consist of conflicting lode claims. Up to 1870 there can be no doubt that a placer claimant could not be heard to adverse a lode

applicant. While placer claims were undoubtedly known to the local laws, and recognized by state and territorial statutes, they were not entitled to patents from the United States, and therefore an adverse would be a nullity.

The act of 1870 only changed this by permitting claims usually called placer to go to patent under like circumstances and conditions as lode claims. Did this addition to the law change the rule as to the relative rank and importance of lode and placer claims? Mineral lands were still the highest and most important lands within the control and ownership of the government. All other claims to land gave way when once its mineral character was established; railroad grants, town-site claims, pre-emption filings, and even the sacredness of the homestead right, were all inferior. And of mineral lands, the lode claim was the standard. Placer claims were expressly made to cover only mineral lands that did not contain veins or lodes of rock in place. A placer claimant could not frame an adverse that would prevent a lode claimant from going to patent unless he alleged that the so-called lode claim contained no lode, but was really placer ground pure and simple, and this would only suggest an inquiry as to the character of the land, a matter wholly within the jurisdiction of the land department, and not the subject of an adverse claim at all.

**Powell vs. Ferguson, 23 L. D., 173.**
**Snyder vs. Waller, 25 L. D., 7.**

The law of 1872 did not attempt to change this condition of affairs. It chiefly elaborated the provisions of the acts of 1866 and 1870, and by section 11,

which is now section 2333 of the Revised Statutes, provided for that condition of affairs where land was found to contain both clasess of deposits. It rather emphasizes our position that lodes could only adverse lodes, and placers adverse placers, by providing expressly that possession of a placer claim was not possession of lodes found within it. Lode claims were still the standard and the higher class of deposits. Placer claims could still cover no vein or lode in rock in place. How, then, can an inferior location adverse a superior? Can an agricultural claim adverse a mineral claim? Or a mill-site a lode claim? How, then, can a placer claimant lay claim to a lode claim when the statute says expressly that his placer claim can not cover a vein or lode in rock in place?

The language employed in these various acts is conclusive. The act of 1866, after prescribing certain conditions as to mining claims, says:

> "And in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for the said claimant," etc.

The next section provided that a patent might issue in case no adverse claim was filed, and section 6 of the act provided that whenever any adverse claimants to any mine located and claimed as aforesaid shall appear, all proceedings should be stayed until a court of competent jurisdiction had determined the right of possession. It will thus be seen that in this act it was contemplated that no claim to the mine for which a patent was asked could be heard, unless

it was really adverse and related to that particular mine. The same meaning is carried into section 2325. That section says among other things:

> "*If no adverse claim* shall have been filed, it shall be assumed that an applicant is entitled to a patent, and *that no adverse claim exists*, and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

Section 2326 says:

> "Where an adverse claim is filed during the period of publication, it shall be upon the oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings as to publication or notice, and making and filing of the affidavit thereof shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or adverse claims weighed."

The section then proceeds to state what shall be done, and how patent shall afterwards be acquired. We contend that nothing is contemplated by these sections except claims *which are really adverse*, and that if a claim is filed which is not adverse, or which can not affect the merits of the pending application for patent, no good complaint can be framed in its support. Now, what are the facts when a lode claim-

ant applies for a patent upon a lode claim, and he is met with an adverse claim from a placer location? The lode claimant asserts that he has discovered certain mineral bearing veins or lodes upon the public domain, that he has located the same, complied with the state laws, the local rules and customs of miners, the regulations of the department, and the statutes of the United States, and asks the government to grant to him a patent for these lode claims. He is met with a protest and an adverse claim, which sets up that the protestant is the owner of a placer claim covering the same ground as that embraced within the lode claim. He asserts that he has located and is the owner of that placer claim. Can such a claim be adverse in any sense of the word? Does not the mere statement of the placer claimant put him out of court? Section 2329 provides:

> "Claims usually called placers, including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent."

From the moment the placer claimant goes upon record, saying that he is the owner of a placer claim pure and simple, does he not expressly say that his claim does not include any other form of deposit, except a placer deposit? And does he not expressly say that he claims no veins of quartz or other rock in place? If this is true, how can his claim be adverse to the application of the lode claimant?

We concede, of course, that if the placer owner claimed title to the lode, he would have to adverse. But his adverse then would have to be based upon a

claim that he had also located a lode within the limits of his placer, or that the lode applied for had passed to the placer owner by virtue of its being an unknown lode when the placer owner had applied for a patent. If the placer owner had obtained his patent he would not be compelled to file his adverse.

It is only of late years that the true distinction between lode claimants and placer claimants has begun to be realized. A number of late decisions of this court have made this matter clearer than it ever was before. The profession and miners are beginning to understand the clear distinction between the two classes of claims. As already noted, it has been finally settled by this court that when a placer claim applies for a patent, and says nothing about lodes, the owner of a known lode need not file an adverse claim, and that his rights are fully protected.

Iron Silver Mining Co. vs. Mike and Starr Co., 143 U. S., 394.

This is the latest expression of opinion, and reviews all the cases. And it has been settled by the land department that when a lode claimant applies for a patent and is met with a placer adverse and the placer claim wins in the courts, that it only becomes entitled to the placer ground as such, and the judgment does not prohibit the lode claimants from securing title to their lodes.

Aurora Lode vs. Nugget Gulch Placer, 23 L. D., 95.

That the adverse claim must be really adverse in character has been settled in numerous cases. Thus

It has been decided that where a tunnel has been located, and a lode claimant afterwards applies for a patent for ground along the line of the tunnel, that the tunnel owner need not file an adverse claim to protect his rights.

Enterprise Co. vs. Rico-Aspen Co., 167 U. S., 108,

the court concluding its opinion in that case with these words:

> "And as the defendant could not, in any suit which it might institute, establish a certain adverse right, and as litigation in the courts is based upon facts and not upon possibilities, it seems to us that nothing was to be gained by instituting adverse proceedings, and, therefore, nothing lost by a failure so to do."

The Supreme Court of Colorado has decided that the owner of an easement need not file an adverse claim to protect it. The court stating in so many words that such a claim was not the subject of an adverse suit, as it was fully protected by the provisions of the federal laws.

Rockwell vs. Graham, 9 Colo., 36.

If any right which is fully protected by the law is not the subject of an adverse claim, it follows that a placer claim is not entitled to adverse a lode claim, for any rights which a placer claim may have are fully protected by the laws.

The Supreme Court of Montana has also held that a person owning a highway over a mining claim need not file an adverse when the mining claim owner applies for a patent.

Murray vs. City of Butte, 7 Montana, 61.

And the same court has held that a mine owner need not adverse an application for a town site.

Silver Bow M. & M. Co. vs. Clark, 5 Montana, 378.

O.

Mr. Lindley has made a careful collection of all the cases.

2 Lindley on Mines, secs. 717 *et seq.*

This court in the various placer mining cases that have been before it has emphatically announced the same rule. We have already called attention to the case of tunnel claims. In one of the Iron Silver Mining Company cases it used this language:

> "It is true that there are no very distinctive words declaring what kind of adverse claim is required to be set up as a defense against the party making publication; but throughout the whole of these sections and the original statute from which they are transferred to the revised statutes, the words 'claim' and 'claimant' are used. This word is, in all legislation of Congress on the subject, used in regard to a claim not yet perfected by a title from the government by way of a patent. And the purpose of the

statute seems to be, that where there are two claimants to the same mine, neither of whom has yet acquired the title from the government, they shall bring their respective claims to the same property, in the manner prescribed in the statute, before some judicial tribunal located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the action of the officers of the land department in determining which of these *claimants* shall have the patent, the final evidence of title, from the government. This view is consistent with the entire statute on the subject, and some of its language is inconsistent with the idea that any contest to be thus decided is between a party who already has the legal title to the property which he claims and some other party who is only setting up a claim to the same property."

Iron Silver Mining Co. vs. Campbell,
135 U. S., 286.

And, again, it has held contrary to some earlier rulings of the land department that one co-tenant need not adverse an application for a patent made by his co-tenants, the court saying that the statute contemplated conflicting mining locations, and not contests as to the ownership of one location.

Turner vs. Sawyer, 150 U. S., 578.

The same point was decided some years earlier by the Supreme Court of Colorado.

Doherty vs. Morris, 11 Colo., 12.

Mr. Lindley, in his work on Mines, the only philosophical work that has ever been written upon the subject, takes the position that a lode claimant can not adverse a placer claimant, and *vice versa,* that a placer claimant can not adverse a lode claimant. We quote the following from Mr. Lindley's work:

> "Where an application for a patent for a lode within the limits of a placer is made by a lode claimant, if the placer claimant asserts any right to the lode, he is necessarily called upon to adverse. Where his claim, however, is placer, pure and simple, under which claim he can not lawfully assert a right to the lodge, he has nothing upon which to base an adverse claim. If he disputes the existence of a lode within the limits of his placer, the assertion involves the character of the land—a question to be passed upon preliminarily by the land department, and ultimately by the courts, where the issue may be raised in any appropriate action other than those brought to determine adverse claims, under section twenty-three hundred and twenty-six of the Revised Statutes. These deductions logically follow from the principles announced in the preceding section."
>
> 2 Lindley on Mines, sec. 721.

The decisions of the land department are as conclusive and to the same effect. It is held than an agri-

cultural claimant can not file an adverse against a mineral claimant.

Powell vs. Ferguson, 23 L. D., 173.

So the owner of a mill site is not entitled to file an adverse claim again a mineral applicant. We quote from that decision the following:

> "It appears that the Rainy Day mill site was 'located' in 1878, but so far as the record shows no attempt has ever been made to secure a patent for the same. In 1889 the Waller lode claim was located, which conflicts with the mill site. As a result of the hearing had, it was decided that the land was mineral in character, and this judgment became final. The character of the land is therefore finally settled as mineral. Hence it follows that it can not be entered as a mill site. (Alta Mill Site, 8 L. D., 195.)
>
> "The adverse proceeding contemplaed by the statute is for the purpose of determining the right of possession as between parties claiming conflicting mining claims, and does not, in my judgment, comprehend a suit in the courts to settle the question as to the character of the land. That subject is one that is exclusively within the jurisdiction of the land department, and any judgment of a court on this question would not be, necessarily, binding on the department. (Alice Placer Mine, 4 L. D., 314; Powell vs. Ferguson, 23 L. D., 173.)

"Where the character of the land is involved to the extent that the determination of that question fixes the right to purchase the same, it can only be decided by the executive branch of the government, which is clothed with the power to determine the question. It follows, I think, that there is nothing for the court to determine under the adverse that would aid the department in deciding to whom the patent should issue."

Snyder vs. Waller, 25 L. D., 7.

See, also,

Elda M. & M. Co. vs. Mayflower Gold M. Co., 26 L. D., 573.

Cape May M. & L. Co. vs. Wallace, 27 L. D., 676.

A still later case decides practically the identical point. A patent was issued by the department to the Noyes placer in Montana. After the placer had been located, but before patent was applied for, the South Star lode claim was located. The South Star afterwards applied for a patent upon a portion of its ground, and after considerable controversy was successful. The balance of the South Star lode claim was then located as the North Star lode, and a patent was asked upon this North Star lode. Within the time mentioned by statute a protest and adverse claim was filed on behalf of the Noyes placer, and an adverse suit commenced in the District Court of Montana. This case was finally pushed to judgment and decided in favor of the North Star claimant, who

then presented his judgment roll and asked for a patent thereon. The department held that it was not a proper case for an adverse claim, saying upon this point:

> "The so-called adverse claim and suit of the placer patentees were intended to be in conformity with sections 2325 and 2326 of the Revised Statutes, which, as a part of the proceedings to obtain patent to a mining claim, provide for judicial determination of the possessory right to ground embraced in conflicting mining claims. These proceedings were commenced prior to the decision (April 28, 1890) by the Supreme Court in the case of Iron Silver Mining Co. vs. Campbell (135 U. S., 286), and, presumably, upon the theory that it was incumbent upon the placer patentees to take such action in order to protect their rights against the application of the North Star lode claimants. In the case cited, however, the Supreme Court held that the statutory provisions relating to adverse claims apply only where there are adverse claims to the same unpatented mining ground, and that they do not apply to one who 'had himself gone through all the regular proceedings required to obtain a patent for mineral land from the United States; had established his right to the land claimed by him, and received his patent.'
>
> "The suit instituted in the local court by the placer patentees against the North Star lode claimants was, therefore, not an ad-

> verse proceeding within the purview of the statute, and the judgment rendered therein, while entitled to great respect, can not be accorded the conclusive effect which attaches to a judgment rendered in an adverse proceeding such as is contemplated by the statute."
>
> North Star Lode, 28 L. D., 41.

We can not conceive of any distinction between the rule here laid down and that for which we are contending. A placer patent confers no greater rights upon a placer owner than a placer location, so far as lodes are concerned, except that the patentee is entitled to all lodes not known to exist at the time the patent was applied for. How, then, can the owner of a placer who has no application for a patent pending, and whose previous applications have been rejected as fraudulent and void, be heard to set up his placer title against a lode located within the limits of his placer claim? Not a single authority, or even dictum, can be cited against our position on this point.

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THIRD.

*Is a decision of the land department of the United States binding upon other tribunals, or can courts re-litigate and determine the same matter in a subsequent proceeding?*

This brief has already reached such a length that but a short space need be given to this proposition. But the point has been so often decided that it will only be necessary to call attention to the cases.

The record here shows that in the trial of the cause the defendants relied upon two decisions of the land department concerning the Searl placer. One was by the commissioner of the general land office, holding the placer claim void because it was located upon non-placer land. The other was by the secretary of the interior, affirming the ruling of the commissioner. The land office record will be found in the transcript, beginning on page 40, at folio 75, and running over to page 63. The opinion of the commissioner begins on page 55, and of the secretary on page 60. The substance of these proceedings is that Searl applied for a patent, and his application was rejected, because the department, after a trial, found the land was not subject to entry as a placer claim.

The defendants pleaded these proceedings as a defense to the suit, and offered them in evidence for the same purpose. The plaintiffs demurred to the defense and the demurrer was overruled. Under this ruling the introduction of the proceedings in evidence should have ended the case, as it was a complete substantiation of the defense; but another judge presided at the trial, and he completely ignored this feature of the case.

The Supreme Court of Colorado affirmed the ruling of the trial court upon the theory that a rejected application for a patent was nothing more than judgment of non-suit, and did not settle finally the character of the land. In this case, it insisted that the only finding was that at the time of the application for a patent, the land was not placer. It relied upon a dictum of Secretary Smith, in 22 L. D., 527, and a judgment of its own in the case of Beals vs. Cone,

27 Colo. The case of Beals vs. Cone has since been before this court, and was dismissed for want of jurisdiction.

We recognize the force of the decision of the Supreme Court, and of the doctrine of Secretary Smith, but can not believe they are applicable to the facts of this case. The same point was fully argued before Judge Hallett, and again before Judge Riner. We have already called attention to the conclusions of these jurists sustaining our position. But to get the matter before the court, we will again quote their language. Judge Hallett said:

> "The defendant has demurred to this replication, and relies upon the proposition that, whatever may have taken place in the land office, the placer claim is still a good location in so far as to enable the defendant to maintain possession of the premises, and to resist any location which may have been made by the plaintiff or any other person on the placer claim. I think this position is untenable. When the placer location was held to be invalid in the land office, it was thereupon void for all purposes; the premises covered by the placer location were public land, and no further proceedings could be had upon that location; the plaintiff, and everyone else, was at liberty to go upon the premises and make another placer location, or a lode location, as they might find the facts to be."

Judge Riner said:

> "Case No. 3846 argued yesterday. In my judgment the evidence in this case does not show that the ground in controversy is placer ground. I think, too, the good faith of the parties making the placer location, and their grantees, may be well doubted. The location was made twenty-three years ago, and no effort has been made by them to develop and work the claim as a placer. Neither is it established as a fact by the testimony that the necessary assessment work has been performed. The views just expressd seem to be in harmony with the findings of the land department, but, if it were otherwise, it could make no difference, as the findings of that department must be held to be conclusive upon the questions of fact; that is to say, as to the character of the land, etc. A judgment will be entered in favor of the defendants."

So we have the views of these distinguished judges of the federal bench, opposed to the views of two of the judges of the Supreme Court of Colorado.

But the distinction between the case of Beals vs. Cone and the case at bar, and the fallacy of the position of the Supreme Court of Colorado, can be easily detected. An application for a patent may be rejected upon one of two grounds: First, something that destroys the entire claim; or, second, something that only affects the patent proceeding itself. For instance, the statute requires the applicant to have a perfect possessory title, to have his claim surveyed

by the surveyor general, and to have completed at least five hundred dollars' worth of work. If it should appear that the five hundred dollars' worth of work had not been done, or the surveyor general had not made a good survey, the patent application would be rejected for this reason. This would come under our second class mentioned above, and would not affect the applicant's possessory title. His *location* would remain good, and he could get a proper survey, or do his work and apply again for his patent. But if the application complies with the law and the patent is denied for some reason that sweeps away the entire claim of the applicant from its inception, then we insist that his rights must end. And surely an adjudication that the land is not subject to entry as mineral land puts an end to any claim that might exist, based on a mineral claim. A finding by the land department that a placer claim had been located on nonplacer land is surely an end to that claim.

The Beals vs. Cone case comes within the second class of cases. There an application had been rejected because of some defect in the discovery shaft, and afterwards on a second application it was found that this defect had been corrected. If the finding in the first instance had been that the land was not mineral at all, this would have settled it.

The matter determined in Searl's application for a patent was the character of the land. It has been decided by the land department, and the decision affirmed by this court, that the land department must finally determine the character of public land, and that even though, in an adverse suit, where the jurisdiction was undoubted, this question was involved, yet afterwards the land department had the right to

say whether or no the land could be sold under the classification made in the adverse suit.

Alice Placer Mine, 4 L. D., 314.

Perego vs. Dodge, 163 U. S., 160.

And in the late case of

Powell vs. Ferguson, 23 L. D., 173,

it was held that any adverse suit which only had for its object an adjudication respecting the character of the land could not be maintained, as this question had to be determined solely by the land department.

This is undoubtedly the law.

Snyder vs. Waller, 25 L. D., 7.

Aurora Lode vs. Bulger Hill Placer, 23 L. D., 95.

2 Lindley on Mines, Sec. 765.

This court has also decided in any number of cases that the decisions of the department on questions of fact are conclusive, and can not be reviewed, annulled or set aside in any other tribunal.

Bishop of Mesqually vs. Gibbon, 158 U. S., 155.

It says in a later case:

> "It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final. Whether,

for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it can not be doubted that the decision of the land department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined. John vs. Towsley, 13 Wall., 72; Smelting Company vs. Kemp, 104 U. S., 636; Steel vs. Smelting Company, 106 U. S., 447; Wright vs. Roseberry, 121 U. S., 488; Heath vs. Wallace, 138 U. S., 573; McCormick vs. Hayes, 159 U. S., 332."

Burfenning vs. Chicago, St. Paul R. R. Co., 163 U. S., 321.

We have, therefore, an adverse claim presented which, upon its face, can possibly call for no adjudication except as to the mineral character of the land embraced within a so-called placer claim, which question has already been decided by the department. Suppose, as actually happened, that the court should decide contrary to the previous rulings of the land department. Would the land department be bound by, or would it follow, this decision of the court? These questions have all been answered in the authorities to which we have just called attention. The department, while giving to the judgments of all courts of record the very highest consideration, will say that upon these subjects, which are within its exclusive jurisdiction, it must decline to be bound.

The ruling of Secretary Smith in 22 L. D., 527, is only a dictum. He had already given sufficient reasons for his conclusion and this sentence was added to his opinion without any necessity.

He says that the decision as to Searl's application only went to the extent of cancelling his application for a patent, and did not affect his possessory rights. It seems to us that this statement is, upon its face, an absurdity. A man locates a placer claim upon *non-placer land*. The fact of its non-placer character is determined in a solemn adjudication by the proper tribunal appointed for that purpose. The locator remains upon the land and insists upon his placer title. Has such a person a possessory right in any sense of the word? Suppose that an agricultural claim is located upon mineral land and the mineral character of the land is determined by the government. Could it possibly be said that the agricultural claimant still has a possessory right? The decision that the claim is void in its inception, for the reason that it is made upon land which under no circumstances could be patented or claimed under the classification sought, destroys every vestige of title, possessory or legal.

In the first place, the old distinction between possessory and legal titles, so far as mining claims are concerned, is fast disappearing. We call attention to the following language of the Supreme Court of Montana:

> "The easement so granted by virtue of a location in pursuance of the law is the right to the possession, and the right to purchase when the law has been fully complied with. The location is the foundation of the posses-

sory title, and possession under it, as required by the law and the local rules and customs, keeps the title alive. The government holds the superior title in trust for the person so holding the possessory title until, by complying with the law, he may acquire the full title.

"But this easement or grant to the locator can not be severed or divided. Being made up of the possession and the right to purchase, if the right to the possession fails, the right to purchase is gone; and if the right to purchase is defeated, the right to the possession can not be maintained. So, therefore, the person making the location, and his grantees, who only succeed to his rights, must have the capacity both to possess and to purchase; otherwise the grant of the government becomes divested and the ground again open to location. There can not be such a location under the law as entitles the locator or his assignees to the possession without the right to purchase, nor to purchase without the right of possession. Possession and the right to purchase go together. They are parts of the same grant, which is a unity, and which becomes vested by the act of location. Therefore, the right to the possession can not be transferred to any person who is incapable of causing his possessory right or title to ripen into a full title by purchasing from the government. Such a person could not so occupy and possess; he could not so comply with the law

> and the local rules and customs as to preserve his right to the possession, because such right can only be kept alive by being linked to the right to purchase. Possession under a location is preliminary to a purchase, and can only be of that character. It is one step in the possession by which the government parts with its title to the purchaser. And so he who takes possession under a location, or he to whom such possession is transferred, must be capable of becoming a purchaser from the government, for such possession is part of the purchase. If, therefore, possession is transferred to one who, under the statute, is incapable of becoming a purchaser from the government, such possession, being part and parcel of the purchase, is illegal, and such transfer of possession is equivalent to abandonment, and opens the ground to location and possession by anyone capable of making and holding the same."
>
> Tibbitts vs. Ah Tong, 4 Montana, 526.

And, in the same volume, in the case of Noyes vs. Black, page 527, the court says:

> "This is a case of actual possession against a valid location. The plaintiffs, by virtue of possession alone, attempt to hold mining ground as against a valid location of the same ground. This they can not do."

This court has settled the question beyond a doubt. It says:

"The next inquiry is whether the attempted location in December became operative on the first of January so as to give Belk an exclusive right to the possession and enjoyment of the claim after that. We think it did not. The right to the possession comes only from a valid location. Consequently, if there is no location, there can be no possession under it. Location does not necessarily follow from possession, but possession from location."

Belk vs. Meagher, 104 U. S., 279.

See, also:

Horswell vs. Ruiz, 67 Cal., 111.
Lelande vs. McDonald, 2 Idaho, 283.
Gwillin vs. Donnellan, 115 U. S., 45.
Noyes vs. Mantle, 127 U. S., 348.
Kendall vs. San Juan Co., 144 U. S., 658.
Manuel vs. Wolff, 152 U. S., 505.

If there is no location there can be no possession under it. How can a placer claim be located upon non-placer ground? The very foundation of the location was taken away by the decision of the department. It has frequently been decided by the department that after there has been a determination of the character of the land, an application to enter it under a different classification will be denied. Perhaps the latest instance of this will be found in the case of

Coleman vs. McKenzie, 28 L. D., 348.

The entire opinion in that case is very instructive. A hearing had been had in 1882, at which it

was determined that the land was mineral. The mineral claimant, however, failed to patent the land or taken any further steps in regard to it. In 1893 a homestead application was filed upon part of the land, and on March 13, 1896, a new hearing was ordered to determine the character of the land, and finally, on March 4, 1897, the register and receiver rendered an opinion that the land was valuable only for agricultural purposes, and on appeal to the commissioner of the land office this decision of the register and receiver was affirmed. The mining claimants then appealed to the department. The department held that it was error to order a hearing upon the character of the land; that the hearing of 1882 settled this question; it became *res judicata*, and could not be opened merely by an application to patent a portion of the land as a homestead and a mere statement that it was agricultural and not mineral. The various decisions of the department in similar cases were gone over, and we think the reasoning is conclusive. We quote the following from the opinion:

> "A mistake was made by your office in giving to the decision of the department merely the effect of a mineral return, and allowing the homestead claimants to make entry of the land upon the mere filing of a non-mineral affidavit.
>
> "Here there had been not only a mineral survey, but also a contest between mineral and agricultural claimants. The character of the land had been put in issue, a large amount of testimony had been submitted on that point, and after consideration thereof the department held the land to

be mineral in character. The effect of that decision could not be overcome or impaired by the mere allegation that the land contained no valuable mineral; nor could the mineral claimants be called upon to again sustain the mineral character of the land upon a mere repetition of the allegation made by the original agricultural claimants that it is not mineral land. (Stinchfield vs. Pierce, 19 L. D., 12; Dargin *et al.* vs. Koch, 20 L. D., 384; McCharles vs. Roberts, 20 L. D., 564; Mackell *et al.* vs. Goodsell, 24 L. D., 553; Leach *et al.* vs. Potter, 24 L. D., 573; Town of Aldridge vs. Craig, 25 L. D., 505; Wilson vs. Davis, 25 L. D., 514.) To secure a hearing whereby the effect of that decision might be overcome it was necessary for the agricultural applicants to allege that exploration and development subsequent to the former hearing or trial had shown the land to be non-mineral, or that the former decision was based upon fraud or mistake such as would justify further inquiry into the character of the land. At such a hearing proof of the abandonment of the mining claim would have been a circumstance tending to show that the mineral claimants deemed the land worthless for mining purposes. In the case of McCharles vs. Roberts, *supra*, it is said that abandonment of the mining claim must be alleged and proven to avoid the effect of a former decision holding the land to be mineral, but a more accurate statement of the matter is that the

> allegation and proof of abandonment are material only in so far as they tend to disclose the estimate placed upon the value of the land for mining purposes by one who has been engaged in the exploration thereof, and who was most interested in sustaining its declared mineral quality."
>
> Coleman vs. McKenzie, 28 L. D., 348.

Would not the department have reached the same conclusion if the decision in 1882 had been that the land was not placer ground, and someone in 1895 had attempted to locate it as a placer claim? The case at bar, however, is even stronger than this. Here the original applicant for a patent, whose application has been rejected because it was based upon a placer claim located upon non-placer land, is again at the bar of justice, not claiming any new discovery, not insisting that he has since demonstrated that the land is valuable, not asking for a rehearing, but simply ignoring the ruling of the department.

The point made by the Supreme Court that the parties are different does not apply. An application for a patent, as stated by Judge Brewer, is a proceeding *in rem*.

Wight vs. Du Bois, 21 Fed. Rep., 693.

The government is the owner of the land, and invites all persons to enter upon it and purchase under certain conditions. If one person enters and fails to comply with those conditions, this fact can be availed of by anyone else who attempts to comply. The *government* is always a party to these proceedings and acts as trustee for all parties concerned. The first

application of Searl was a controversy between Searl and the government acting as trustee for certain parties who had filed protests, and everyone else concerned. This controversy is between Searl and the government acting as trustee for the Clipper Mining Company and all parties concerned. The fact that it takes the form of an action of ejectment between Searl and The Clipper Company does not alter the situation. The Clipper Company derives its title from the government, who was a party to the first controversy.

But the first proceeding was *in rem*. It established the *status* of the land. Searl advertised his application to the world and had a public hearing and was defeated. The proper tribunal on this hearing established the status of the land as such. It was the same kind of a proceeding that an admiralty court takes when it fixes the *status* of a ship, or a divorce court when it fixes the *status* of a marriage. The decree is always admissible to prove these facts. So this finding of the land department should have been admitted to show the character of the land, and should have been held conclusive.

We have now gone over all the points of the case, and we submit upon reason and authority the decision of the Supreme Court of Colorado should be reversed. We submit that this court should sustain the position of the federal courts, the land department, and of all the text writers.

Respectfully submitted,

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FILED
NOV 16 1903
JAMES H. McKENNEY,
Clerk

# Supreme Court of the United States.

**OCTOBER TERM, 1903.**

*No. 76.*

THE CLIPPER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE ELI MINING AND LAND COMPANY ET AL.

## REPLY BRIEF FOR PLAINTIFF IN ERROR.

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(18,590.)

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# Supreme Court of the United States.

**OCTOBER TERM, 1903.**

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THE CLIPPER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE ELI MINING AND LAND COMPANY ET AL., DEFENDANTS IN ERROR.

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ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

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## REPLY BRIEF FOR PLAINTIFF IN ERROR.

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### FIRST.

Counsel say something in their brief about jumpers. The facts shown by the record as to the relative merits of the contending parties are few. It appears that the lode claimants waited patiently from 1877 to 1890, and that during these thirteen years the placer claimants had kept up their pretense of a placer claim, until finally, in November, 1890, the Secretary of the Interior, after full argument, decided that the ground was not placer ground. The public and every one supposed that this was the end of this so-called

placer location. The highest authority in the Land Department had expressly ruled that the ground was not placer. Thereupon the grantors of the plaintiff in error went upon the land quietly and peaceably and located the four lode claims in controversy, spent thousands of dollars in development, and finally demonstrated that they are valuable mines.

This is the position of the lode claimants, and yet they are termed jumpers. So far as the placer claimants are concerned, their position is also set forth in the record. At the bottom of page 55 and the top of page 56 we find in the decision of the Commissioner of the Land Office that a special agent of the Land Department, on December 14, 1882, reported that he had investigated this placer claim and found no improvements located thereon except some made by other parties, which the placer claimants were endavoring to appropriate. We also find that the said agent reported that the land was supposed to contain lodes, and that the placer claim was clearly fraudulent. This badge of fraud, put upon the claim twenty-one years ago, has continued down to the present time. The United States circuit court of appeals for the eighth circuit, in passing upon one of these cases, quoted the opinion of Judge Riner concerning this placer, in which Judge Riner, in a case tried in 1900—in which a mass of testimony was introduced—again held that the placer claim was not located in good faith and had never been maintained as a placer claim in good faith, thus again putting the badge of fraud upon this location.

Eli Mining & Land Company *vs.* Carleton, 108th Fed. Rep., 24.

This is the relative standing and good faith of the litigants before this tribunal. These facts appear from the record.

We would like to make one or two references to the state-

ment of facts, or claimed statement of facts, set forth in the brief for defendant in error. A number of quotations from earlier decisions in the Land Office are given, including the decision of Commissioner Williams with reference to a lode claim called the Zulu. The fact is that all these decisions are referred to in the opinion of the Commissioner of the General Land Office, found in the record of this case, beginning on page 55. The opinion of Commissioner Williams and the result of it is set forth in folio 105, in next to the last paragraph, on page 55. It there appears that the result of this opinion of Commissioner Williams was that the Zulu application for a patent was rejected, but a hearing was ordered to ascertain whether or not the Zulu lode actually existed within the limits of the placer. As the result of this the placer applicants became frightened and filed an amended application excluding all lode claims except the Zulu and Lucy B. Hussey; thereupon all adverse suits, including the Zulu and the Lucy B. Hussey, were dismissed. As to what became of the Zulu and the Lucy B. Hussey does not appear from the record. It would seem, however, from this brief statement that some compromise must have been made with these claimants. These earlier decisions of the Land Office were simply rulings as to whether or not the land was mineral, and of course the Land Department was bound to decide that it was mineral. To show the real effect of these rulings and how they are regarded by the Land Office, we file with this brief and print as an appendix a certified copy of the last decision of the Commissioner of the General Land Office, quotations from which have appeared in our original brief. We think it due to the court to put it in possession of this entire opinion, as it is very elaborate, goes into the questions at issue quite thoroughly, and was fully sustained by Secretary Hitchcock after an elaborate oral argument before Judge Van Devanter and several of his assistants, who were the legal advisers of the

Secretary of the Interior. The opinion of Judge Van Devanter, or rather the Secretary, sustaining this decision is found in Clipper Mining Company *vs.* Eli Mining & Land Company, 29 L. D., 137, quotations from which are contained in our original brief. It will appear from these various proceedings that the original hearings with reference to this placer were simply to determine whether it was mineral ground or not, and that afterwards a hearing was had as to whether it was placer ground, and upon that hearing all the land officers found it was not placer ground.

A good deal was said in the brief of the defendants in error, and something was said in the oral argument, and some questions asked by this court upon the subject of prospecting for lodes within a valid placer location. We do not believe this question is really before the court. The supreme court of Colorado, in its original opinion, did say something about prospecting, but on rehearing it was practically forced to abandon all that had been said in its original opinion and rely upon the abandoned placer application. This position was so untenable that counsel in their oral argument never referred to it and scarcely referred to it in their printed brief. We simply ask the court to read the evidence in the case, found upon pages 38 and 39 in the transcript. It is asserted that all the evidence was not taken up; but the bill of exceptions states that the substance of all the evidence introduced by both sides is in the bill of exceptions. (See page 63 of the Record.) And we insist that it is much better for an appellate court, and enables them to get a clearer view of the points actually in issue, simply to state the substance of the evidence without writing it out at length. In fact, it has been announced by a number of courts that this is the best way to make up a bill of exceptions. We would, upon this point, call attention to the petition for rehearing, found in the transcript, beginning on page 72, and the authorities cited on page 80. We would ask the court to read this pe-

tition and then note the opinions of the supreme court of Colorado upon rehearing. We submit that in its opinion, upon rehearing, the court abandoned all of its reasoning contained in its first opinion, which would include what it said about prospecting, and attempted to adopt the view that the date for the fixing of known lodes in an unpatented placer was not that of location, but of application for a patent.

We wish also to call attention to the Mount Rosa case, which is referred to in the briefs and was mentioned in the oral argument. That was a decision by Mr. Justice Goddard, one of the ablest judges ever upon the supreme bench of Colorado. We quote the following from Judge Goddard's opinion in that case:

"This is an action instituted by the appellee, plaintiff below, against appellant, The Mt. Rosa Mining, Milling and Land Company, defendant below, to quiet his title to two lode mining claims situate within the exterior boundaries of a certain tract of land conveyed to appellant by a Government patent, as placer mining ground.

"Upon the trial it was admitted that the lode claims were formally and regularly located as provided by law, except as to the discovery of mineral therein; that affidavits in lieu of labor, for the years subsequent to their location, were properly filed by the owners, that by proper conveyances the plaintiff became, and was, the owner of whatever title had been acquired by virtue of such locations.

"It was further agreed that the placer owned by the defendant was located some time prior to the location of the lode claims; that the application for a patent was not made until after their location; that the defendant, through proper conveyances, was the owner of the placer.

"The only question of fact that remained in dispute was whether or not a vein or lode was discovered and known to exist in the Handy Andy and Newman claims, within the boundaries of the Mt. Rosa placer at the time appellant applied for patent for such placer, on August 18, 1892."

We submit that it will be seen from this quotation that the lode claims there were located in the placer before the placer had applied for a patent, but that at first no mineral was discovered. This could mean nothing else than that the lodes were not known to exist, and the question was whether they were proved to exist before the placer applied for patent, and the supreme court of Colorado, in the able opinion of Judge Goddard, held that party had the right to make the lode locations, and if the lode was actually discovered before application for patent this was sufficient. We submit that this is the identical question in this case. We would ask the court to compare the use of the word "discovery" by Judge Goddard, where we have quoted it above, with the use of the word in the bill of exceptions in this case, upon page 39. We might say, in passing, that it is stated in the brief of the defendants in error that these lodes were not discovered until 1895. This is not true. The testimony on page 39 shows they were known to some witnesses as far back as 1881, and then the bill of exceptions states that everything required by statute, as to the discovery, location, recording and annual work, had been completely done; that at the time of their location, on November 25, 1890, a lode was known to exist. The word discovery as used there is used in the same sense as used by Judge Goddard in the Mount Rosa case.

We submit, therefore, upon the first point discussed in our original brief, that the law as contended for by us is correct. It is remarkable that not a single authority is cited in the brief of the defendants in error, or was called to the attention of court upon oral argument, that upholds their contention. The only authorities which they cite are those glittering generalities about right to possession and the initiation of title by trespass. No one disputes any of those principles; but possession of a placer claim does not give possession of a lode claim, and the location of a lode within a

placer is not a trespass, because the placer claimant has no title to the lode.

As stated in our original brief, it does not seem possible that this court in its placer decisions, the supreme court of Colorado in the Mount Rosa case, all of the officers of the Land Department, and the Federal judges of Colorado can be wrong on this point, and that the two judges of the supreme court of Colorado in this case are the only ones that are right.

## SECOND.

We do not care to add to our original brief upon this point, except to call attention to the case in 29 L. D., 522, where it is held by the Land Department that a townsite applicant cannot adverse a lode claim. The Secretary there reviews the authorities quite fully, and sustains our position in much better language than we could state it. We respectfully refer the court to that additional authority. There can be no difference between the principle of that case and the principle of the case at bar.

## THIRD.

We think we have covered this point fully in our original brief, but counsel for defendants in error gave it first place in their brief and expend most of their ammunition upon it. We would like to call attention to their summing up, which is found upon page 19 of their brief. We submit that the ruling of the Land Office was that this was not placer land. The use of the words "as a present fact," upon which both counsel and the Colorado court like to dwell, does not, in our judgment, change the result of this conclusion. Mr. Searl applied for a patent upon his placer. He was met by a protest, upon which a hearing was had to determine, first, the character of the

land; and, second, the status of existing claims and interests. As a result of this hearing, it was found by the register and receiver, who listened to the witnesses, that the improvements required by law had not been put upon the property, and that the land was not sufficiently valuable for placer mining purposes to authorize a placer patent. Thereupon the application for a patent was dismissed. We would like here to call attention to an error in the printing of the opinion of the Commissioner in the record, near the bottom of page 59—fifth line from the bottom—the word "not" is found in the record, when it is very evident it should be omitted, as the Commissioner said that the evidence did indicate the probable existence of mineral in rock in place. This decision was then affirmed by the Commissioner and afterwards by the Secretary. It has been ever afterwards treated and referred to by the Land Department as a ruling that the land had been found to be not valuable for placer purposes. We would, in support of this, call attention to the opinion of the Commissioner, which we file with this brief, and to the opinion of Secretary Hitchcock affirming it. While we concede that the Department can always investigate the character of land belonging to the United States at any time before patent finally issues, yet, when it is once determined land is of a certain character, that finding is conclusive until reversed by the Land Department itself, and it is conclusive up to the time of the decision. Any other rule would result in endless chaos, so far as courts of justice are concerned. There must be an end of litigation in the Land Office as well as in the courts, and where the Land Office has finally disposed of an application and dismissed it from the pale of its jurisdiction, that finding should be just as conclusive upon the courts as though it had entertained the application and granted the patent. For instance, in this case, if Mr. Searl had received a patent when he made his application this court would be bound by the findings of

the Land Office that the ground was placer. When the Land Office refuses the patent, is not its conclusion then equally binding? We believe that this court will be bound to hold that it is.

As already shown, the case is distinguished from Beals *vs.* Cone case, in that there the application was rejected only for some defect in the discovery shaft of the applicant. That was amended upon the second application and the patent allowed.

In conclusion, we would like once more to call attention of the court to the fact that it would seem to be a gross injustice for this court to say that an unpatented placer is more valuable or given more rights than a patented placer, and yet it is conceded that this is the effect of the decision of the supreme court of Colorado.

Such a result will be that many new mining districts will be at the mercy of a few speculators. The moment it is known that a new discovery has been made the country can be covered by placer locations. In Colorado a placer location covers as much territory as sixteen lode claims, and one hundred dollars' worth of work a year will hold the entire placer; that is, sixteen lode claims could be held at an annual expenditure of six dollars for each. The ground would be withdrawn from exploration and purchase although the title was still in the United States. Eight persons, seven of whom are usually only nominal parties, can locate as many placer locations as they please and monopolize an entire district. No one could even be permitted to enter within the limits of the claim. We would also call attention to the fact that stone quarries, saline deposits, and similar tracts may now be located and patented as placer. It will be seen how easy it is to withdraw large tracts in this way. Surely if the doctrine of the supreme court of Colorado stands, we will see, as Colonel Morrison says, the intent of Congress in the disposition of the public mineral lands clearly defeated.

We would also insist that it is unjust to the owners of these four claims to hold that their claims are invalid when, as appears from the 108th Fed. Rep., 24, other claims located in the same placer have gone to patent. In other words, simply because our case happened to be tried in a State court instead of a Federal court is no reason why we should not receive the same measure of justice.

Respectfully submitted.

C. S. THOMAS,
W. H. BRYANT,
H. H. LEE,
*Attorneys for Plaintiff in Error.*

# APPENDIX.

4–219.

N. E. C. F. DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, WASHINGTON, D. C., *November* 14, 1903. C. A. B.

I, J. H. Fimple, acting Commissioner of the General Land Office, do hereby certify that the annexed copy, pages 1 to 15, inclusive, of decision of this office dated December 20, 1898, in case of The Clipper Mining Co. *v.* A. D. Searl *et al.*, involving the Searl placer and Capital and other lode claims, Leadville, Colorado, land district, is a true and literal exemplification of the record of said decision on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal United States General Land Office.]

J. H. FIMPLE,
*Acting Commissioner of the General Land Office.*

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"N." G. F. P. DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, WASHINGTON, D. C., *December* 20, 1898. W. O. C. H. G. P. J. V. W.

Address only the Commissioner of the General Land Office.

THE CLIPPER MINING CO. *v.* A. D. SEARL ET AL. } Capital and Other Lode Claims. M. E. 4347.

*Register and Receiver, Leadville, Colorado.*

SIRS: August 31, 1893, the Clipper Mining Company made mineral application No. 4359 for the Capital, Congress,

Clipper and Castle Lode claims, mineral survey No. 6965, the claimed portion of which lies wholly within the limits of the Searl placer claim, mineral survey No. 435. Said Searl placer claim was located December 14, 1877; was applied for July 5, 1879, and publication therefor made; was adversed and suits thereon instituted. November 10, 1882, an amended application for said placer claim was filed, reducing the area originally applied for to permit the exclusion of certain lode mining claims.

Said placer application was, however, rejected because of the non-placer character of the land, which action on successive appeals was confirmed by departmental decision of November 13, 1890 (11 L. D., 441). Said Searl placer claimants, however, were among those who adversed the Clipper Mining Company's lode application for the said claims, and instituted suit upon their adverse. The other adverse claims have been concluded without trial. The Clipper Mining Company, ignoring the Searl adverse suit, proceeded to make application to purchase. This application was rejected by the local office because of the pendency of the suit on the placer adverse.

An appeal from such rejection was taken, the lode claimants arguing that under said departmental decision of November 13, 1890, the placer claimants had no rights upon which to base such adverse suit. This contention was not, however, sustained, for by departmental decision of May 13, 1896 (22 L. D., 527), affirming the successive decisions below, it was held that the former decision of the Department in the Searl placer went only to the extent of rejecting the placer application for patent; that it did not assume to declare the placer location void; that it did not affect the placer claimants' possessory rights, and, therefore, that under said adverse proceedings the lode application must await the judgment of the court on the suit instituted, a mere matter of procedure which has been followed.

The judgment of the court in said suit, dated June 8, 1898, is in favor of the placer claimants for the entire area applied for and claimed under the adverse, and under this judgment on August 4, 1898, the local officers allowed the adverse placer claimants to make mineral entry No. 4347 for the "Capital, Clipper, Congress, and Castle Lode mining claims." The papers were duly forwarded to this office, where it has been strongly urged that important interests were dependent

upon the immediate issuance of patent on the entry. The entry, however, has proceeded in the regular order under the rules, due time having been allowed all parties in interest to be heard thereon.

September 8, 1898, The Clipper Mining Company, the defendant in the adverse suit, filed in this office its protest against the issuance of patent on such entry for reasons hereinafter stated. September 19, 1898, said company's resident attorneys filed what purports to be a copy of a writ of error from the supreme court of the State of Colorado to the district court of Lake county, Colorado, which latter court rendered judgment in the case. November 4, 1898, the entrymen's resident attorneys filed an argument and motion, praying for the dismissal of said protest and for the immediate issuance of patent on the entry. December 1 and 10, 1898, the protestant and S. M. Carleton, as the general manager of the Clipper Mining Company and in his own behalf, filed, by the resident attorneys, additional protests and arguments in the case. The office, therefore, has the benefit of able and exhaustive briefs which are supported by a formidable array of authorities bearing upon the points in this case.

It will readily be seen from the foregoing and from the fact that the land involved is situated in North Leadville that careful consideration is required to reach a conclusion in this case which will be in harmony with the mining laws and the regulations thereunder. The case could, however, be disposed of without going into the record or the argument presented, but in view of the importance of the matters presented a complete recital of the record will be made.

This examination, however, will be confined to the case as it stands, and will not include the voluminous record heretofore had in the case and now on file in the office, wherein it is shown that the original application for the land as a townsite entry was rejected because of the mineral character of the land, and wherein the placer application was rejected because of the known lode and non-placer character of the land after a careful investigation by the Land Department. The entry was made under the following provisions of section 2326, U. S. R. S.:

"After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof,

may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess."

The entry papers consist solely of a corrected but still inaccurate copy of the judgment-roll, satisfactory proof of all of entryman's citizenship except F. C. Schroeder, the application to purchase, the receiver's receipt, the register's final certificate, and the local officers' statement that the lode application papers are on file in this office.

There is no survey or certificate of improvements with the entry papers, and if it was intended that the survey of the lode claims would supply this deficiency, such expectations will not be realized. The lode survey does not presume to describe the land covered by the adverse or described in the judgment. It simply describes the lode claims which lie partly outside of the placer limits. If patent were to issue on the entry, a survey in accordance with the description of the judgment would have to be made and an accurate copy of such judgment furnished; also a certificate of improvements would have to be furnished. There is no apparent effort made to conform to the requirements of the statute, that a certificate of improvements and "the description required in other cases" shall be furnished with the judgment-roll. Section 2326, U. S. R. S.

See also Albert F. Marsh, 2 L. D., 706.
Alice Placer, 4 L. D., 314.

The question is, however, whether if the survey were made it should be for lode or for placer claims; in other words, whether entry should have been made under lode or placer laws, or either. In the adverse claim, the placer claimants allege *inter alia* that the lode applicants "have not discovered the top or apex of any vein of quartz or rock in place or any vein or lode bearing gold * * * or other

valuable deposit running lengthwise of their pretended claims or any part thereof."

In its decision in this case the court held:

"The defendants having entered upon a valid subsisting location of a placer mining claim owned by and in the possession of the plaintiffs did not initiate any rights whatever."

The judgment of the court concludes therefore that the plaintiffs are entitled to—

"That portion of the placer claim called the Searl placer claim situate in the California mining district, county of Lake and State of Colorado, bounded and described as follows:"

But here the placer claimants and the court part company. The final certificate of entry describes the claims as lode claims, gives the length of the lode lines, and concludes with a reservation of all rights to the remainder of the placer claims. The courses and the distances given in the judgment-roll are described in the certificate. Such judgment is intended to follow the description of the adverse which gives the exterior lines only of the conflict without any reference to the identity of the lode claims. Neither does said judgment-roll attempt a description of the lode claims. Nowhere in the record is there any claim asserted by the placer owners to lode in said placer. There is absolutely nothing in the record upon which the placer claimants can hang a claim to the lodes which have been entered. If, as alleged in the adverse upon which judgment was rendered, the lode locators had made no discovery, then there could be no lode location, for a lode location without a discovery must fall. But, strange to say, the court in this case is "satisfied that the defendants have discovered a lode claim within the boundaries of the Searl placer, but that the discovery was made subsequent to the location of the placer."

There was only one question before the court, the question of the right of possession of the ground involved, and the court found this to be in the placer claimants, not because they had any right to the lode claims, but upon the new and novel ground that the lode claimants had no right to enter upon the placer location. It is not necessary to the decision in this case to consider the effect of this, the first decision of the courts denying any right to lode locators within the

limits of a mere unapplied-for placer location, a decision at total variance with the practice and rulings of this office and the Land Department. It is evident, however, that if the entry is at all possible under said judgment it must be made for a placer claim only as it cannot be made for lode claims under the clear and unmistakable rulings of the Department in the case of the Aurora Lode *v.* Bulger Hill and Nuggett Gulch Placer, (23 L. D., 95) as follows:

"* * * I do not understand that by the said adverse proceedings the owner of the placer claim asserted any right whatever to the possession of the vein or lode. On the contrary, the complaint filed in the court distinctly sets forth a claim to the premises in question as a placer mine, and makes no claim to any vein or lode that may exist therein. Instead, therefore, of any claim to the possession of the vein or lode being shown by the adverse proceedings, it clearly appears therefrom that the then placer claimant *disclaimed* any such right of possession, by basing his said adverse proceedings wholly and solely upon a placer location or claim.

"* * * The question there determined was simply the right of possession of the placer claims, distinctly as such; nothing more. No claim to the lode was asserted by the adverse claimant, although it appears from the said protest that its existence and its ownership by Bennett, etc., were at the time, well known and generally recognized facts. The complaint filed by the adverse claimant whereon the proceedings in the court were founded, which is not restricted to the premises in controversy here but appears to cover the whole area of the placer locations, avers the right of possession in the plaintiff of the premises described, as *placer claims*. The issue tried by the court, therefore, must necessarily have been simply whether the plaintiff was entited to the possession of the premises as *placer claims*. It could have no wider scope under the pleadings.

"By the judgment of the court there was awarded to the plaintiff 'the possession of the above described placer mining claims.' No question as to the ownership or right of possession of the lode was passed upon. No such issue was raised by the pleadings, and therefore could not have been decided by the court."

Practically this same principle has again been enunciated by the Secretary in his decision dated December 7, 1898, in the case of the Alice Mining Company, wherein it appears

that the lode application was adversed by a placer claimant company which secured judgment for the placer claim and upon which judgment the placer claimant made entry for the lode claims, which entry has been ordered canceled.

The conclusions laid down in the above cases are strikingly applicable to the conditions existing in this case. Under said rulings, by which this office is governed, it must be held that the entry for said lode claims was not warranted by the judgment and was, therefore, erroneously allowed.

It cannot be claimed that this is refusing to follow the judgment of the courts, as directed by the statute, and which the entrymen's counsel quotes as an inexorable rule which this office is bound to follow. The statute provides that patent under the judgment shall issue for the tract the claimant is shown to "rightly possess." Clearly the entrymen have not asked for what they are shown to "rightly possess," even if they possess any rights in the matter, but they have asked for what is clearly shown they do not possess. This is proven by the judgment itself, which found that it was the defendants who had "discovered the lode claim within the boundaries of the Searl placer." But, beyond this, the mere entry of judgment does not compel the Land Department to issue patent thereon, a fact generally recognized and sanctioned by the courts. The claimant must satisfy the Department that the law has been complied with in every particular.

Alice Placer, 4 L. D., 314.
Perego *v.* Dodge, 163 U. S., 160.

There is only one possible way under the U. S. mining laws by which a placer applicant can secure title to known lodes within his placer claim and that is in the manner provided for in section 2333, U. S. R. S., by asserting claim to such lodes in his placer application.

But it is impossible under the proceedings taken in this case to assert any such claim to the lodes entered. They were not claimed in the placer application, either original or as amended, nor in the adverse suit nor in the judgment based thereon. It is extremely difficult, therefore, to determine by what construction of the mining laws such a claim as is here asserted can be made or defended.

The entire proceedings in this present case display a remarkable estimate of the purpose and scope of the mining laws

by the entrymen. Their placer application for patent, made without any claim to known lodes, was rejected because of the non-placer character of the land applied for. They proceed, however, to adverse the lode applications, and secure judgment because of the prior placer location. They now seek under cover of such judgment to secure patent for the lode claims which they denied ever existed. To admit such proceedings would be to place a violent and unwarranted construction on the meaning or the purpose of the mining laws.

The utmost liberality is allowed under said laws to persons seeking title to the public lands, so long as the claims are made in good faith and the land covered thereby is subject to disposition under the form of the laws applicable thereto, but there is no place in either the spirit or the letter of the law for cases of this kind. If there are lode locations in such placers which are not claimed by the placer applicants, it is a perfectly plain proposition that they should be held to be the property of the lode locators. This is the ruling of the Department and the courts, even including the court which decided this case, which, however, fails to distinguish between the two classes of mineral deposits, lode and placer, which are separate and distinct as are agricultural and mineral lands.

However, enough has been stated to show that the entrymen have no right to the lode claims under the judgment. Nor is the office called upon to consider at this time whether an entry can be made under said judgment for the placer claim. This involves the question of the character of the land, a question which is solely within the jurisdiction of the Land Department.

St. Louis Smelting Co. *v.* Kemp, 104 U. S., 636.
Lee *v.* Johnson, 116 U. S., 48.

The case might be closed at this point, but it is here where the protestants present matter calling for consideration and action. The protestants insist that the entire adverse proceedings were invalid, but no consideration need be given this in view of the fact that said departmental decision of May 13, 1896, *supra*, held otherwise and this office has no alternative, even if it felt inclined to hold otherwise. They also allege failure of the placer claimants to perform the annual assessment work. This question also seems to have

been disposed of as the court held, "that the Searl placer was duly located, as required by the law, in 1877, and that the annual labor has been performed, as required by law, to the present time."

They also refer to the existence of suit in court between the Searl placer claimants and the Seal placer claimants, which latter claim covers the ground included in the Searl placer claim. But these are not matters for the consideration of this office in this case, and are not in any way involved and could not be affected by any decision made.

The only allegation that is worthy of any consideration whatever is that which alleges that a writ of error has issued in this case, and the question is whether action by the Land Department should be suspended until final action by the courts on said writ of error. The judgment of the court is dated June 8, 1898. August 3, 1898, the clerk of the court certified that no appeal had been filed and that no costs had been paid before the beginning of the August term, 1898, which was necessary in order to obtain a new trial. The copy of the writ of error is not properly certified. It is contended, however, by the protestants that the same is now under consideration by the courts. It is, however, considered sufficient for the purpose of determining whether proceedings in this case should be stayed, as required by section 2326, U. S. R. S.

The writ of error, dated September 15, 1898, is in the name of the chief justice of the State supreme court directing the clerk of the trial court to certify up the record in the case so that the judges of the supreme court may have it before them on October 15, 1898. The only record of any action in the matter is the statements by the protestants' attorneys that action thereon is under consideration, and it is upon this that the protestants ask a stay of proceedings.

The entrymen's resident counsel ingeniously argues that apart from the fact that the writ of error lacks the necessary certification, it is not sufficient to warrant the stay of proceedings asked for; that a writ of error is not a continuation of the old suit, but a new suit; that it cannot affect the intervening rights; that execution has issued upon the judgment of the court in this case; that the entrymen have not been advised of the writ of error or of any action or proceeding thereunder, and that even if allowed, said writ need not delay the issuance of patent under the judgment, for if

the judgment was reversed the patentee could be declared trustee for the rightful owner by supplemental proceedings in court. The arguments for the protestants are equally strong and instructive, but all are wholly inapplicable to this case, and many of them could be more properly and profitably submitted to the courts. The fact remains that if the writ of error actually issued in this case, all proceedings before the Land Department must be stayed unless it is apparent that action by the Land Department would not be affected by the final decision of the court.

It is true that the Land Department is not required to await the expiration of the time allowed for appeal or writ of error, but where it has notice of such filing it must consider the same. It is also true that a writ of error, technically speaking, is in the nature of a new suit. It is generally considered, however, as the continuation of the same cause of action, which entrymen's counsel practically admits when he states that if the lower court were reversed it would not affect the patent, a proposition that cannot be entertained, as upon its face it admits the possibility of the issuance of an erroneous patent. Further, a writ of error is to the common law what appeal is to the statutory law, and in the State of Colorado both forms are equally allowed by section 401 of the Code of Civil Procedure, three years being the limit within which to bring said writ of error; section 402, *supra*. It is claimed, however, that execution has issued on such judgment, and that there is no evidence that a *supersedeas* has issued on said writ, and the entrymen allege that none will issue because it is claimed that the writ was sued out for the sole purpose of delaying final action on the entry. This claim is denied, however, by the protestants, but in any event the *bona fides* of the application for the writ of error is a matter for the courts to determine and is not a question for the Land Department to either consider or to pass upon; and so far as the entryman's claim is concerned, there is nothing to show that this case should prove any exception to the general rule.

There is, however, a question whether it will be necessary for the Land Department to await action by the courts on the case.

It is established to the satisfaction of this office by the foregoing proceedings that the suit instituted on the placer adverse has not been finally determined and that so far as

the records show is still pending in court. It therefore follows that the entry allowed before final disposition of adverse proceedings is in contravention of the statute and is therefore invalid.

It is held that an entry so allowed must be canceled.

Mayer *v.* Hyman, 7 L. D., 83.
Brown *v.* Bond, 11 L. D., 150.

See also
Richmond Ming. Co. *v.* Rose, 114 U. S., 576.

Therefore, and for the reasons hereinbefore stated, this entry is hereby held for cancellation.

Very respectfully, BINGER HERMANN,
*Commissioner.*

W. E. M.

# Supreme Court of the United States.

**OCTOBER TERM, 1903.**

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*No. 76.*

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THE CLIPPER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE ELI MINING AND LAND COMPANY, A. D. SEARL, F. C. SCHROEDER, A. T. BRITTON, AND H. J. GRAY.

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## BRIEF FOR DEFENDANTS IN ERROR.

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### STATEMENT.

This is an adverse claim suit brought by defendants in error under section 2326, United States Revised Statutes, "to determine the question of the right of possession" to certain mining ground at Leadville, Colorado. The case was tried without a jury, resulting in findings and judgment in favor of defendants in error (R., 14), and affirmance of such judgment by the supreme court of Colorado (R., 66), with denial of petition for rehearing (R., 84).

The adverse claim and suit of defendants in error was based upon the location of the premises as a placer mining claim December 14, 1877. The plaintiff in error claimed

under certain alleged lode locations made in November, 1890. The trial court found (R., 63) thus:

> "The court is satisfied from the evidence that the "Searl placer was duly located as required by the "law in 1877, and that the annual labor has been "performed as required by law to the present time. "The court is further satisfied that the defendants "have discovered a lode claim within the boundaries "of the Searl placer, but that the discovery was made "subsequent to the location of the placer."

Upon this finding the court then stated that—

> "The questions to be determined in this care are, "Has the locator of the placer the exclusive right to "the possession, and can a prospector enter within "the boundaries of the placer and discover a lode "claim before application for a placer patent is "made?"

Thereon the court invited filing of briefs and argument by counsel, which being done resulted in its decision (R., 64) that—

> "The locator of a placer mining claim has the ex- "clusive right to the possession thereof, and a pros- "pector cannot enter within the boundaries of a "placer and discover a lode claim unless there has "been an abandonment by the placer claimants. "The defendants having entered upon a valid sub- "sisting location of a placer mining claim owned by "and in the possession of the plaintiffs, did not "initiate any right whatever."

In affirming this judgment the supreme court of Colorado, in concluding its well-reasoned opinion therein, said (R., 70):

> "Our conclusion, therefore, is that one may not go "upon a prior valid placer location to prospect for un- "known lodes and get title to lode claims thereafter dis- "covered and located in this manner and within the "placer boundaries, unless the placer owner has

"abandoned his claim, waives the trespass, or by his "conduct is estopped to complain of it. If the trial "court intended to rule that in no circumstances may "one, before application for patent of a placer claim, "go upon the ground within its exterior boundaries "for the purpose of locating a lode, it went too far; "yet as general language in an opinion must be taken "in connection with the facts of the particular case, "the ruling here should be limited to the facts dis- "closed by the record, and no prejudicial error was "committed. For, under the authorities, a prospector "may not enter upon a prior placer location for the "purpose of prospecting for, or locating, unknown "lodes or veins; and to uphold the judgment we must "presume that the evidence before the trial court "showed that the veins or lodes upon which defend- "ant's grantors based their locations were unknown "when they entered upon the Searl placer for the pur- "pose of prospecting.

"The mere fact then, that the judgment may have "been based upon a legal proposition—too broadly "stated as a universal rule—that in no case may a "location of a lode claim be made within the bounda- "ries of a prior valid placer location,—a legal con- "clusion which, as we have said, is only partially "right,—is not, under the facts of this case, sufficient "to work a reversal; for certainly a lode location "may not thus be made except of a known lode. "Though a prospector may believe that within the "limits of a placer location a lode may exist and by "development work be disclosed, he has not the right "to enter thereupon for the purpose of exploiting the "ground to confirm his belief."

And in the second opinion of the State supreme court denying petition for rehearing the same conclusion was thus well expressed (R., 87):

"*In Del Monte M. & M. Co. v. Last Chance M. & M.* "*Co.*, 171 U. S., 55, the court, in making answer to ques- "tions certified to it by the United States circuit court "of appeals of the eighth circuit, said that 'the lines

"'of a junior lode location may be laid within, upon or
"'across the surface of a valid senior location for the
"'purpose of defining for or securing to such junior
"'location underground or extralateral rights not in
"'conflict with any rights of the senior location.'
"And this answer, plaintiff in error now contends, is
"authority for its contention to which we have just
"referred. With this we cannot agree. Mr. Justice
"Brewer, who wrote the opinion in that case, ex-
"pressly recognizes the fact that no rights can be in-
"itiated as the result of a trespass, and on page 79 of
"the opinion says that the form in which the ques-
"tion is put excludes any impairment or disturbance
"of the substantial rights of the prior locator; and
"he quotes with approval the statement from 1 Lind-
"ley on Mines, section 363, that 'a subsequent locator
"'may not invade the surface territory of his neigh-
"'bors and include within his boundaries any part
"'of a prior valid and subsisting location. But con-
"'flicts of surface area are more than frequent.'
"While the learned judge was speaking of lode
"claims, the principle is just as applicable to a placer
"claim to the extent of the surface rights which be-
"long to it. So long, therefore, as lode claims are not
"known to exist within the limits of the prior placer
"claim at or before the time of the application for
"placer patent, it is unlawful for one to go within its
"limits for the purpose of prospecting for, and with
"the hope of discovering and locating them."

The brief submitted by counsel for plaintiff in error fails to set forth the record facts in any connected form. Before endeavoring to supply this omission we desire to sharply challenge the "statement of case" upon their brief, pages 1–5. The mineral lands in and adjacent to Leadville had for many years prior to the creation of that city been held and worked as placer mining claims, and such claims in California gulch and its neighborhood had yielded millions of dollars in placer gold. In fact, a large part of the present city of Leadville stands upon the Thomas Starr placer claim,

which was patented as such on March 29, 1879. The validity of that patent was sustained by this court in *Smelting Company vs. Kemp*, 104 U. S., 636, and *Steel vs. Smelting Company*, 106 U. S., 447. The Searl placer claim here involved adjoins this patented Thomas Starr placer mine, and the mineral formation of each is identical.

The patent for this Starr placer mine was issued after protest and extended hearing had in July, 1878, wherein the Commissioner of the General Land Office in October, 1878, held the land to be mineral and the placer claimants' occupation long antecedent to the townsite. Upon the character of the land the Commissioner ruled thus:

> "The weight of testimony shows that all the land "embraced in this claim was regarded as placer "mining ground as early as 1860; that it was pros- "pected with favorable results in different localities; "that it has not all been worked because of the lim- "ited supply of water and want of proper facilities; "that 'California Gulch,' which is a part of this claim, "and lies on the southerly portion thereof, has been "worked for a long time, and a large amount of gold "taken therefrom; that placer mining is being ex- "tended from said gulch northwardly towards the "settled portion of the town; and that, while gold has "been found in all parts of this claim, no one has "opened a shaft on the northern part of the claim, "which has been sunk to bed-rock, and it is man- "ifestly impossible to estimate with any certainty the "value of that part of the claim as mineral land; "yet that it is mineral land, of more or less value, is "clearly established by the record. It also appears "that it is not feasible to work the northern portion "of the claim until after the lower portion shall have "been worked out; it shall be reached by slow ap- "proaches in the regular progress of operations which "are gradually being extended from California Gulch "towards the north; and hence the fact that it has "not been worked cannot have the effect of raising "even a presumption of its non-mineral character."
>
> *Sickle's Mining Law & Decisions*, 1881, p. 351.

On appeal the Secretary of the Interior affirmed this decision, holding, after careful consideration of the evidence, that—

> "I concur with you that the land embraced in the "application is land which should under the pro- "visions of section 2318, Revised Statutes, be held as "'valuable for minerals' and should be reserved from "sale except as provided by law regulating the sale "of mineral lands."
>
> *Ibid.*, pp. 353, 354.

Counsel are hence in error when they assert that before July, 1878, "the great mining camp of Leadville had in meantime "become fully established and the lode character "of all its mineral lands fully demonstrated." *Contra*, placer mining was being actively carried on, and its large extent is plainly visible today from the wash and debris created thereby. Hence at the time of the location of the Searl placer, in December, 1877, the placer character of the deposit had been fully determined by actual working, and it is well known that the loose rock and earth carrying this placer deposit covers substantially the whole area of and surrounding the city to great depth; so that the discovery of underlying lodes has since been made only by sinking several hundred feet below this surface deposit to reach any semblance of lode or vein matter in place. It is equally incorrect to assert, as do counsel, that the United States Land Department and the Federal courts have upon any fair trial of the *fact* of placer deposit ruled this land not to be placer or subject to location as such. On the contrary, the very first decision rendered in the Department by Mr. Secretary Schurz, on April 19, 1880, in a contest between the townsite of North Leadville and the claimants of the Searl placer, and involving the direct question, distinctly held upon the testimony adduced in that trial that this placer claim "was valuable for minerals within section 2318, U. S. R. S."

*Copp's Land Owner*, vol. 7, p. 36.

Counsel are equally in error in asserting that *any* decision of the United States Land Department has held the Searl placer location void. *Contra*, that Department in declaring the meaning of its own decisions thereon (its undoubted and exclusive right) has in express language disavowed any such holding or intent.

*In re Clipper Mining Co.*, 22 Land Decisions, 527. R., 62–63.

The relevant facts on which this controversy depends cannot be more concisely and correctly stated than as given in the opinion of the supreme court of Colorado, thus (R., 66–68):

> "The plaintiff in error (defendant below) owns four "lode mining claims, situate in Lake county, called "the Capital, Clipper, Congress and Castle lodes, and "the defendants in error (plaintiffs below) own the "Searl placer mining claim, within the boundaries "of which these lode claims are located. The present "controversy relates to the territory thus in conflict. "The placer was the prior location, and was made in "the year 1877. The plaintiff in error having made "application in the land office for patent of its lode "mines, the defendants in error filed therein an ad-"verse claim, and within the statutory time brought "this action in the district court of Lake county to "enforce it.
>
> "The plaintiffs rely upon a prior location of the "conflicting territory as part of their placer claim. "The complaint is in the ordinary form in actions of "this character. After a general denial of the mate-"rial allegations of the complaint, the answer sets up "four separate defenses, all of which grow out of the "following facts, which, in varying language, are set "up in each defense.
>
> "On the 12th of December, 1877, A. D. Searl and "others located the Searl placer, and on the 5th of "July, 1878, applied for a patent therefor. Numerous "protests were made against it, and on the 10th of "November, 1882 an amended application was filed

"against which protests were likewise made upon the "ground that the same was not placer ground, and "was only valuable for lode claims, or townsite pur- "poses. The Land Department ordered a special in- "vestigation to ascertain the character of the ground "and the good faith of the applicant. The special "agent declared that the land was not placer ground, "and on the strength of his report a hearing was or- "dered before the local land office of the district, the "result of which was a dismissal of the application, "for it was not then made to appear, as a present "fact, that the ground was distinctively valuable for "mining purposes, or that the applicant had made "the improvements required by statute. This rul- "ing was affirmed by the Commissioner of the "Land Office and in turn by the Secretary of the In- "terior. Twelve days after the latter's decision, the "grantors of defendant company entered upon the "ground within the boundaries of the placer location "and thereafter located thereon the lode claims in "question.

"The special defenses sought to be interposed were "substantially: *First*, that plaintiff was not entitled "to recover because, upon the previous application "for a patent of the Searl placer, there was a decision "of the Land Department that the ground included "within its boundaries was not placer ground, and "the attempted location was for that reason void, and "such decision was *res adjudicata* of the present con- "troversy; *second*, assuming the existence of a prior "valid placer location, nevertheless defendant, prior "to the time patent was asked, went upon the placer "surface area and made locations of the lode claims "which were then and theretofore known to exist, "and, therefore, in law the same were a part of the "unappropriated public domain and subject to loca- "tion as lode claims.

"There was a replication by plaintiffs denying the "new and special matters of defense, and upon the "issues thus joined, in a trial to the court without a "jury, the findings were that the Searl placer was "duly located as required by law in the year 1877 "and thereafter the annual labor had been performed

"as the statute provides, and that defendant's grantors "had discovered the lode claims within the bound- "aries, and subsequent to the location, of the Searl "placer. Based upon these findings of facts, the con- "clusion of law was drawn that a prior location of a "placer carries with it the exclusive right of posses- "sion of the surface included within the exterior "boundaries, and a prospector might not enter there- "upon and prospect for, or discover, a lode claim be- "fore application for the placer patent is made, unless "by abandonment the placer claimant has lost his "rights. And there being no evidence of such loss, "it was accordingly held that the acts of defendant "in entering upon the valid subsisting placer loca- "tion did not initiate any right whatever. Judg- "ment was therefore entered in favor of the owner "of the placer location, and to reverse it this writ of "error is prosecuted."

## ARGUMENT.

Numerous errors are assigned (R., 6–8), but the brief for plaintiff in error presents but three propositions for discussion here.

### I.

THAT THE UNITED STATES LAND DEPARTMENT HAS HELD THIS PLACER LOCATION VOID, AND SUCH DETERMINATION IS BINDING UPON THE COURTS.

Responding to this contention, the supreme court of Colorado holds (R., 68):

"1. It is insisted by plaintiff in error that the Land "Department, with which is entrusted the determina- "tion of such questions, has declared this placer lo- "cation void because not on placer ground, and that "such determination is decisive of the present con- "troversy. It is unquestionably the law that find-

"ings of fact by the Land Department as to matters "within its jurisdiction are conclusive upon the courts "whenever a collateral attack is made upon them. "They may, in a proper proceeding, be impeached "for fraud or mistake, but not in actions like the "present. This rule, however, has no application to "the facts in this record. The application for a "patent to the placer was rejected, but there was no "decision that the ground in question was not placer "ground but merely that, as a then present fact, there "was not such a showing by the applicant as entitled "him to a patent. Amended applications for a "patent of a mining claim are permissible under the "practice in the Land Department. There was no "attempt finally or definitely to determine that the "ground was not placer ground, or that the location "was void, and to that effect are its own decisions, as "will be seen by reference to the official reports.

"7 Copp's Land Owner, 36.

"*In re* Searl Placer, 11 Land Dec., 441.

"*In re* Clipper Mining Co., 22 Land Dec., 527.

"In the last case the Secretary of the Interior, in "speaking of the contention made in this very case, "says: ''The judgment of the Department in the "'Searl Placer case went only to the extent of reject-"'ing the application for patent. The Department "'did not assume to declare the location of the placer "'void, as contended by counsel, nor did the judg-"'ment affect the possessory rights of the contestant "'to it.' See also *Clipper Mining Co. v. Searle*, 29 "Land Dec., 137. Indeed, the question as to the "character of the land sought to be appropriated by "claimants under the public land laws is reserved,— "unless under the law referred to some court,—and "may be passed upon, by the Department until patent "issues.

"*Barden v. N. P. R. R. Co.*, 154 U. S., 288.

"This court in *Beals v. Cone*, 27 Colo., — (62 Pac. "Rep., 948), held that a decision of the Land Depart-"ment like the one in question is equivalent to noth-"ing more than a judgment as of nonsuit, and not

"conclusive upon the Department itself or upon the "parties.

"An additional reason why the plea of *res adjudi-* "*cata* cannot be sustained is that in the former pro- "ceedings the parties are not the same as those in "the present action."

The Secretary's decision *In re Clipper Mining Co., supra* (R., 62, 63), was rendered upon the application of that company to enter the ground here in controversy. It contended there, as here, that the former decision of the Department had finally adjudicated and extinguished the Searl placer claim, and hence the pending adverse claim based thereon should be dismissed, and this adverse claim suit now here at bar ignored. The Secretary denied the application; declared the Department "ousted of all jurisdiction until the case now in court is finally disposed of," and, responsive to the argument and claim of the Clipper Company, added the language quoted *supra* by the supreme court of Colorado. It is manifest such ruling was in no sense *obiter dicta*. The decision was invited by the plaintiff in error. The power of the Secretary to thus authoritatively declare the meaning and effect of the former decision of the Department is beyond question. Every court has and exercises such authority and right. The office of the Secretary is a continuing one; the incumbent acts officially, not as an individual (*Beley vs. Naphtaly*, 169 U. S., 353, 364), and his decision declaring the extent and meaning of a former decision so officially rendered, the case still being *in fieri*, is, we submit, controlling here.

But were this question here open for review we submit fair analysis of the former decisions will demonstrate that the court below correctly ruled thereon.

The decision of the United States land office at Leadville was not introduced in evidence at the trial, and we have no knowledge of what that decision was, except as we gather it

from the decision of the Commissioner of the General Land Office, dated March 6, 1886 (R., 58), which is as follows:

> "You decided that patent should not be issued for "the Searl placer, 1st, because the improvements "thereon were not sufficient, nor of the character re- "quired by law; and, 2nd, because the evidence did "not satisfactorily show that the claim was more "valuable for placer mining than for other purposes."

This decision was rendered by the United States land office at Leadville in the case of North Leadville *vs.* Searl, upon testimony which was taken in November, 1883, in a controversy between squatters upon the public domain and the placer applicants, the squatters claiming that the land *at that time* was more valuable for town lots—"other purposes"—than for placer mining.

Can it be even pretended that the above-quoted decision of the United States land office at Leadville declared void the *location* of the Searl placer or attempted to cancel and annul the possessory rights of those claiming under such *location?* There is certainly nothing in the language of the decision which would indicate any such result or any such intention or purpose.

It will be well to bear in mind the above-quoted decision of the United States land office at Leadville, as it is the *basis* and *foundation* of the decision of the General Land Office and the Secretary of the Interior, which later decisions are simply decisions or judgments of affirmance.

The decision of the Commissioner of the General Land Office dated March 6, 1886, is set forth in full in the Record, pp. 55–60. This decision of the Commissioner is a full review of all decisions had in the Land Department of the United States up to the date of its rendition, with reference to obtaining United States patent to the land in controversy in this action.

At page 55 we find that Robert Berry, special agent of the

Government, on the 14th of December, A. D. 1882, reported that he found that there were no placer improvements on the property; that there were improvements for townsite purposes, and that the land was being rapidly built upon as the city of Leadville increased in size. He reported further that the land was "*supposed*" to contain lodes or ledges of carbonate mineral. While it may be a fact that Mr. Berry did not find sufficient placer improvements on the property to entitle the applicant to a patent in 1882, that is no evidence that there were not sufficient improvements made to absolutely perfect the title to the placer on November 25, 1890, when the grantors of the plaintiff in error jumped the ground. The fact that Leadville was increasing in size and the placer being built upon in 1882 could not and did not vitiate the rights of the placer location made in 1877 and perfected either before or after the examination by Mr. Berry.

The court will also notice that nowhere in the record, or elsewhere, does it appear that the claimants of the Searl placer ever permitted building upon the ground or used the same in any manner for townsite purposes.

Mr. Berry further reports that the land was "*supposed*" to contain lodes or ledges of carbonate mineral, and in this connection we call attention to the fact that he only reported that lodes were "*supposed*" to be contained in the land, and that had there been any lodes *known* to be in the land, even in 1882, he would have very promptly reported that fact; but a *supposed* lode and a *known* lode are two different things, as is very clearly set forth by the United States Supreme Court in the case of Sullivan *et al. vs.* The Iron Silver Mining Company, 143 United States, at page 431, in which the court says that "the knowledge of a vein or lode which covers the expression '*known to exist*,' must be '*actual knowledge*.'"

At page 56 it appears that on the 16th of December, 1882, M. H. Sears, on behalf of himself and others, as townsite

claimants, filed a protest, alleging, among other things, that the Searl placer, the ground in controversy, was not placer ground; that it was immediately adjacent to a well-defined system of lodes; that in December, 1882, the Secretary of the Interior ordered a hearing; that in September, 1883, a hearing was had, witnesses sworn, and other proceedings taken, and then the Commissioner (R., 57, 58) reviews all the testimony taken by the land office, in which it appears that there were witnesses who testified that the land had been properly improved and was placer ground, and other witnesses testified that it was not placer ground and had not been properly improved.

At page 58 the Commissioner quotes the decision of the United States land office at Leadville, as follows:

> "1st. Because the improvements thereon were not "sufficient, nor of the character required by law; "and, 2nd, because the evidence did not satisfactorily "show that the claim was more valuable for placer "mining than for other purposes."

This decision we have already quoted above as having been rendered in the case, North Leadville *vs.* Searl. The Commissioner then says that it was contended by the Searl claimants that a former hearing which was had was *res adjudicata*. Whereupon (p. 59) the Commissioner very wisely decides as follows:

> "One of the essential principles necessary to consti- "tute a matter *res adjudicata* is the identity of the "parties. The parties to the present hearing were not "the parties to the former trial. Independent of this, "however, the objection to the hearing upon the "ground mentioned is not well taken. The *matter* "as to the character of the land is not finally adjudi- "cated until the *title passes from the Government.*"

Then follows a discussion of the question as to *res adjudicata* with reference to the character of the land, with the following conclusion:

"And so long as the subject-matter is under the "control of the Land Department, no number of "trials and decisions will estop further inquiries and "investigations to assure a satisfactory conclusion. "The character of the land has therefore not been "finally determined and it must be decided upon the "testimony taken at the hearing."

This decision of the Land Department seems to us to be conclusive of the point contended for by counsel for plaintiff in error.

While the Commissioner says that he is satisfied that the land is not placer mining ground, he further says that he is not satisfied that the expenditures necessary to acquire a patent are sufficient, and that since the proof does not show that there has been any discovery of a lode within the placer survey, and does not indicate the probable existence of mineral in rock in place, that he was of the opinion that applicants were trying to get the land for townsite purposes (R., 59).

But the undoubted decision of the Commissioner just quoted above is that "the matter as to the character of the land is not finally adjudicated until the title passes from the Government." If that be true, as laid down by the Commissioner in the decision upon which the plaintiff in error relies, then it seems to us to be conclusive that the court below had jurisdiction, fifteen years thereafter, to pass upon and determine the same question, when the matter under the statutes of the United States was pending in a court of competent jurisdiction upon an adverse proceeding.

The Commissioner concluds his decision with a rejection of the application for patent, which cannot be construed to be a cancellation of the *location* of the Searl placer, as is so strenuously contended for by counsel for plaintiff in error.

An appeal was taken from this decision of the Commissioner of the General Land Office, and the decision of the

acting Secretary of the Interior thereon is set forth in full in the Record, pp. 60–61.

The acting Secretary says:

> "Upon the evidence adduced at the hearing had "(November, 1883), the local officers found that the "land was not distinctively valuable for placer min- "ing, and that the same had not been improved as "required by law."

The acting Secretary affirms the decision of the Commissioner as to the question of *res adjudicata* in the following language, holding that the Land Department has jurisdiction to ascertain and determine the character of the land "*until* "*the lands have been either patented or certified* * * *"

As to the merits of the case at bar, he does not decide that the land is not placer ground, but decides as follows:

> "I think that, by a fair preponderance, the evi- "dence establishes the fact that continued prospect- "ing for several years failed to disclose, in any ap- "preciable quantity, the presence of valuable placer "mineral in the claim, or to establish as a 'present "'fact,' within the meaning of section 2329, R. S., the "'placer' character of the land. It further appears "that while the appellant has constructed some "ditches on the tract, he has brought no water "thereon, and that the work on the claim consisted "mainly in making a considerable number of shafts "with a view to the discovery of 'lodes' and not for "the purpose of 'placer' development."

The Secretary quotes the case of *Peirano et al. vs. Pendola*, 10 L. D., 536, which decision we desire to call to the attention of the court, as it formally decides that all decisions with reference to the character of the land are based upon the *present* condition of affairs.

We desire again in this connection to call the attention of the court to the fact that the foregoing decisions of the register and receiver of the local land office, the Commissioner

of the General Land Office, and the acting Secretary of the Interior were rendered in the case of North Leadville *vs.* Searl, a proceeding based upon the protest filed in the United States land office at Leadville in 1882 by citizens of North Leadville, in which the principal contention was that the land in controversy was more valuable for townsite or town lot purposes than for mining.

It does not appear, either from the decision of the register and receiver, the decision of the Commissioner of the General Land Office, or the decision of the Secretary of the Interior, that they or either of them attempted to decide that the *location* of the Searl placer itself was void. The register and receiver decided that the applicants were not entitled to a patent because the land was not more valuable for placer, *as it appeared at that time*, November, 1883, than for other purposes, and because *sufficient improvements had not then been made* in order to entitle the applicants to a patent.

The Commissioner decided that he did not believe it was placer ground *at that time*, and that sufficient improvements had not been made; and, further, that a hearing on the matter in another case was not *res adjudicata*, because the same parties were not before the Department, and also because the question as to the character of the land would not become *res adjudicata* until final entry was made.

The Secretary of the Interior decided that, in a question of that kind, no decision of the Department was *res adjudicata*, and that sufficient improvements had not been made to entitle the applicants to a patent, and also that it did not appear as a *present* fact that the ground was valuable for placer.

As before stated, the decision of Secretary Smith quoted from *supra* refers to the identical ground in controversy in the suit at bar, and to the identical adverse in support of which the case at bar is brought, and decides the identical question which counsel for plaintiff in error is endeavoring to have this court now decide, and which the court below

decided was not *res adjudicata* when it overruled their motion for judgment on the pleadings, and when it admitted testimony concerning the location of the Searl placer and concerning the character of the ground in dispute.

We have here the Land Department deciding, first, that its decision with reference to the character of land is never *res adjudicata* until the title has passed from the Government; second, that as a matter of fact, in this identical case, it did not assume to decide that the location of the placer was void, and that the decisions relied on by plaintiff in error did not in any way affect the possessory rights of the placer claimants to the ground. On the second point the court of last resort has held and decided, as a matter of fact, that there was no judgment of the Land Department, such as is contended for by plaintiff in error, and, as said in plaintiff's brief, the courts will not interfere with any finding of fact made by the Department upon any matter within its jurisdiction. As to the first point, the Department has authority to determine what the effect of its decision or finding is, and the Department has held, as before stated, that the question as to the character of the land always remains an open question until the land is disposed of, and that the Department itself still has the right to pass upon the character of the land until it has parted with the title thereto, and that *when an adverse is filed, the Department is ousted of its jurisdiction.*

We do not think that any one could reasonably contend that if a judgment of the Department was not *res adjudicata* as to the Department, that it would be *res adjudicata* as to the courts in an adverse suit. Indeed, the converse of this is true. The United States courts have repeatedly held for the right of courts to review and correct decisions of the Land Department. See the recent case of George *et al. vs.* Riddle *et al.*, which is reported in 94 Fed. Rep., p. 689, where the ruling of the Secretary of the Interior in canceling an entry was reviewed and reversed by the United States circuit court more than twenty

years thereafter. It would seem by this decision that no act of the Land Department can become *res adjudicata* as to the *courts*. But there can be no question, from an examination of the decisions, regardless of the opinion of Secretary Smith, that the Land Department did not undertake or assume to declare the placer location void, and the courts below and this court could well find, and the courts below did find, that, as a matter of fact, the Department did not adjudicate the matter.

We will therefore conclude the matter of the rulings of the Land Department as follows:

1. There has been no ruling of the Land Department inconsistent with the finding of the court below, viz., that the defendants in error have a valid placer location and are entitled to the possession thereof; and,

2. Even if the rulings of the Land Department are binding upon the courts, as contended by counsel for plaintiff in error, then the rulings which must govern all others and the decision of the court are those which are first made. These are:

First. That of Secretary Schurz, in 1880 (Copp's Land Owner, vol. 7, p. 36), that the ground in controversy is mineral land in character as opposed to a townsite (it will be observed that this ruling was based upon evidence of placer gold discoveries, and that it was rendered more than fifteen years before any lode, according to the record, was discovered in the ground in controversy); and

Second. That of Commissioner Williamson, in 1881, that the ground was properly located as a placer, and that a subsequent discovery and location of a lode thereon by an outsider is illegal. (See, for the former ruling, Copp's Land Owner, vol. 7, p. 36; and for the latter see Commissioner's letter "N" to the register and receiver, Leadville, dated May 31, 1881, as hereinafter quoted.)

But, granting everything contended for by counsel, the principle of *res adjudicata* cannot apply in this case for another reason: Commissioner Stockslager has declared (R., 59), in a case exactly similar to the one at bar, and affecting the same ground, that "one of the essential principles necessary to constitute a matter *res adjudicata* is the identity of the parties."

The court will notice from the record that the evidence upon which they base their claim of *res adjudicata* was taken in the latter part of the year 1883, in the matter of North Leadville *vs.* Searl. The record also shows that the grantors of the plaintiff in error were not parties to that hearing, and that they did not make any claim to the land in controversy until November, 1890, at least seven years thereafter.

> "As a rule, a judgment is not admissible in evi-
> "dence for or against a stranger to the action in
> "which it was rendered."
>
> *12th Am. and Eng. Ency. of Law*, p. 84.

The defendant below was a total stranger to the so-called judgment of the Land Department relied upon by plaintiff in error, and it seeks to introduce the judgment in evidence in its behalf.

> "There is no principle of law more familiar or bet-
> "ter settled than that estoppels to be binding must be
> "mutual. No party can take advantage of a judg-
> "ment or decree if he would not have been prejudiced
> "by it if it had been otherwise. In general, no one
> "is bound unless he was either a party or privy to
> "the adjudication."
>
> *Chandler's Appeal*, 100 Pa. St., 263.
> *McDonald vs. Gregory*, 41 Iowa, 513.
> *Green vs. Beeson et al.*, 31 Ind., 7.
> *Scates vs. King*, 110 Ill., 456.
> *Mayo vs. Wood*, 50 Cal., 171.
> *Paper Co. vs. O'Dougherty et al.*, 81 N. Y., 474.
> *Buckingham vs. Ludlum*, 37 N. J. Eq., 137.

"Where the record in a prior suit fails to show "that a party setting up a judgment in such suit as "a bar to another suit was a party to the prior suit, "it cannot constitute a defense."

*Walters vs. Wood*, 16 N. W. Rep., 116.

It is evident in the case at bar that, had the decision of the Land Office been in favor of the placer claimants, allowing an entry to be made, and for any reason the placer claimants failed to perfect their entry or procure a patent, the plaintiff in error or its grantors, who jumped the property, would not have been bound by any finding or judgment made by the Land Office in the former proceeding, and they could have produced evidence and protested and contested such application in the Land Department or in the courts, at any time before patent. So that there is no mutuality between the parties to this action in the alleged or so-called judgments of the Land Department.

Thus it is apparent from the record that no judgment of cancellation of the *location* of the Searl placer has ever been rendered by any official of the Land Department, as asserted and claimed by the counsel for plaintiff in error; that the issues presented by the pleadings in the court below were not *res adjudicata*, and that the highest official of the Land Department of the United States has expressly decided that—

"The Department did not assume to declare the "location of the placer void, as contended by coun- "sel, nor did the judgment affect the possessory "rights of the contestant to it."

Opposing counsel quote at pages 68–69 of their brief the unreported decisions of Judges Hallet and Riner, which merely *assume* that the decisions of the Land Department discussed *supra* held the Searl placer location to be void. These cases were decided by those learned judges without having before them the decision of the Secretary *In re Clipper*

*Mining Company*, quoted *supra* (R., 62, 63), expressly holding that the Department had *not* so decided. The case before Judge Hallet was ruled upon demurrer, and in the quoted decision of Judge Riner he finds that it is not "established as a fact by the testimony that the necessary assessment work has been performed," while in the case at bar, as against *this* plaintiff in error, such fact is so established and expressly found (R., 63).

Moreover, the conclusion of Judge Riner, as applicable to this case, that the findings of the Land Department "must "be held to be conclusive upon the question of fact—that is "to say, as to the character of the land, etc."—is not in accord with the later and express decision of this court in *Shoshone Mining Company vs. Rutter*, 177 U. S., 505, 511. That case involved the question whether an adverse claim suit was *per se* Federal in its nature and hence within the jurisdiction of the Federal courts. In reaffirming its former decision to the contrary, the court said:

> "Counsel also calls our attention to the difference "in the procedure in the disposal of agricultural and "mineral lands. With respect to the former all pro- "ceedings are carried on in the Land Department, "and it is only after the legal title has passed by "patent that inquiry is permissible in the courts, "while in respect to the latter the aid of the courts "is invoked before the issue of a patent and in order "to determine to some extent the right thereto. No- "ticing this distinction he also notes the fact that a "contest in respect to the validity of a patent for agri- "cultural lands can be litigated in the Federal courts, "and hence draws the inference that a contest pre- "liminary to a patent for mineral lands, and involv- "ing the right thereto, must also be one which can "be litigated in the same courts. But we think the "true inference from this difference of procedure is to "the contrary, because, in respect to agricultural "lands, it is settled that all questions of fact are deter- "mined by the Land Department, and that after the "issue of a patent only questions of law are open for

"consideration in the courts, and as the laws oCon-
"gress alone determine the matter of the disposal of
"the public lands it follows that the questions of law
"which are thus open for consideration are those
"arising under the acts of Congress. While on the
"other hand, as we have heretofore shown, in these
"adverse suits preliminary to a patent of mineral
"lands not merely questions of law arising under the
"statutes of the United States, *but questions of fact and*
"*questions arising under local rules and customs and*
"*State statutes are open for consideration.* The scope of
"the inquiry which is permissible in the two cases
"emphasizes the fact that in the latter case the con-
"troversy may be one not arising under the Consti-
"tution or laws of Congress."

Practical illustration of this doctrine is found in the prior decision of this court in *Bennett vs. Harkrader*, 158 U.S., 441, involving an adverse claim suit by a prior placer locator against a subsequent lode locator. As therein stated, exception was taken in the trial court to the following instructions given, *inter alia* (p. 443):

"You have two ultimate questions to consider and
"those only, namely:
"(1.) Is the plaintiff the owner of the Bulger Hill
"and the Nugget Gulch placer claims and entitled to
"the possession of the soil included within them, and
"are they located on the ground as he has described
"them? Or—
"(2.) Are the defendants the owners of the Aurora
"lode and entitled to the possession of the soil em-
"bracing it, and is it situated on the ground called
"for in the description, in their answer?"

Commenting thereon, the court said (p. 446):

"So far as respects the two instructions complained
"of, it cannot be doubted that they are correct state-
"ments of the law. The two ultimate questions for
"the jury were as stated."

The verdict was:

"We, the jury, find for plaintiff."

This, it was urged, was insufficient.
In overruling that contention this court said (p. 447):

> "Again, in this action, brought under a special "statute of the United States in support of an adverse "claim, but one estate is involved in the controversy. "No title in fee is or can be established. That re- "mains in the United States and the only question "presented is the priority of right to purchase the "fee. Hence the inapplicability of a statute regulat- "ing generally actions for the recovery of real estate, "in which actions different kinds of title may be suf- "ficient to sustain the right of recovery. It would be "purely surplusage to find in terms a priority of the "right to purchase when that is the only question "which can be litigated in such statutory action."

Manifestly in the case cited the ultimate facts submitted to the jury involved determination as necessary elements thereof that the land was or was not valuable for placer deposits, and had been lawfully located and held as such. The issue presented could not have been determined without such basic finding. So in the case at bar the finding of the trial court that the placer location was valid and had been continuously maintained necessarily involved as a constituent element of such finding that the land was in fact valuable for placer mining. That was necessarily involved in the issue presented and in the ultimate fact of a valid placer location which the court expressly found. In so doing, both in the case just cited and in the case at bar, such ultimate facts which determined the right of possession plainly involved determination of all elemental facts necessary to reach the finding of ultimate fact. And as clearly Congress intended that the jurisdiction invested in the courts under the adverse claim provisions of the

statute should cover these essential facts necessary to the exercise of the power to hear and determine the controversy as thus presented thereunder and to determine therefrom "the question of the right of possession" (sec. 2326, U. S. R. S.), or, as stated in the case last cited, "the priority of right to purchase the fee." With jurisdiction thus plainly conferred and constantly exercised, it is plain the finality attending the determination of facts by the United States Land Department in controversies affecting disposal of agricultural land can have no application in respect of controversies between mineral claimants sent by express provision of statute into the courts for such exclusive and controlling determination.

## II.

### THE EXTENT OF THE PLACER LOCATOR'S RIGHT OF POSSESSION UNDER A VALID PLACER LOCATION.

The brief of opposing counsel (p. 6) states the question thus:

> "Can a citizen of the United States enter the limits "of a valid placer location held by possessory title "only, and discover and locate a lode found to be "actually existing therein and not claimed or located "by the locator of the placer?"

Upon this record the question is thus too broadly stated. The inquiry as it here stands for judgment is stated with legal acumen and clearness in the opinion below, thus (R., 89):

> "The question therefore is presented whether, and "if so, in what circumstances, one may, before appli- "cation for a patent of a prior valid placer location is "made, go upon the same for the purpose of pros- "pecting the ground and thereafter make a location "of a lode claim based on a discovery thereafter and "thus made of a vein or lode therein.

Thereon the court holds (R., 70):

"If in the case at bar, the lode claims were known "to exist at the time of the entry of defendant's "grantors upon the Searl placer, under the decision "in the Mt. Rosa case, the entry was not unlawful; "but if on the contrary, the veins were then unknown, "by the same decision the right of possession of this "ground belonged to the owners of the placer loca- "tion. Their right of possession included these un- "known veins, and the entry for prospecting was a "trespass, and no title could thereby be initiated.

"As the evidence was not brought up in the bill of "exceptions, we must assume in support of the judg- "ment below that the proof was against the defend- "ant upon this point. Indeed the specific finding of "the trial court that defendant's grantors went upon "plaintiff's prior existing placer location and *discov-* "*ered* and located lodes therein, involves the finding "that the lodes were unknown at the time of the "entry; for if they were known, they were not dis- "covered by the prospectors, but were already subject "to location by them; and if then unknown, the "placer owner was entitled to their exclusive posses- "sion, and entry upon them by others constituted a "trespass and could not initiate title."

A large amount of testimony was taken upon the trial of the case at bar as to the location of the placer, as to the doing of the annual assessment thereon, and as to the validity of the location when made, which evidence was attempted to be rebutted by the defendant in the court below. The evidence was taken before a court of record sitting as a trial court without a jury. A number of days were consumed in the hearing of evidence on those points. The court heard the evidence of the witnesses and saw their manner upon the witness stand, and also heard the evidence with reference to the alleged locations of the defendant below, as to how they entered upon and attempted to make their location of the so-called Capital, Clipper, Castle and Congress Lode

mining claims. That evidence is not preserved by the bill of exceptions, so that this court, as did the supreme court of Colorado, will presume not only that there was evidence to support the judgment, but will presume that the evidence was sufficient, and that there was a preponderance of evidence upon every point; and it will also be presumed that the court found that the attempted locations of the lode claims made by the plaintiff in error or its grantors were not made in any lawful manner within the boundaries of a valid subsisting placer claim, of which defendants in error had been in possession prior to the entry of the grantors of plaintiff in error, longer than it is required by the statute of limitations of the State of Colorado to acquire a good title.

It is also evident, as it appears at page 39 of the record, that in 1882 and in 1883 no veins or lodes of mineral had been uncovered, discovered, or disclosed within the boundaries of the Searl placer, and consequently none within the boundaries of the ground in dispute; and the record shows that, according to the testimony of the plaintiff in error's own witnesses, the ground in dispute is covered by wash and debris; and no actual discoveries were disclosed thereon prior to 1895; so that any discovery of a lode must have been made by trespassing upon a validly located mining claim and digging through "wash" and "debris," which, according to the evidence produced at the trial, overlaid the entire surface several hundred feet thick.

Upon the record facts there was hence controlling reason that the court below should further rule (R., 70):

> "Our conclusion, therefore, is that one may not go "upon a prior valid placer location to prospect for "unknown lodes and get title to lode claims thereafter "discovered and located in this manner and within "the placer boundaries, unless the placer owner has "abandoned his claim, waives the trespass or by his "conduct is estopped to complain of it. * * * "For under the authorities, a prospector may not "enter upon a prior placer location for the purpose

"of prospecting for, or locating, unknown lodes or "veins; and to uphold the judgment we must pre- "sume that the evidence before the trial court showed "that the veins or lodes upon which defendant's "grantors based their locations were unknown when "they entered upon the Searl placer for the purpose of "prospecting. * * * Though a prospector may "believe that within the limits of a placer location a "lode may exist and by development work be dis- "closed, he has not the right to enter thereupon for "the purpose of exploiting the ground to confirm his "belief."

This conclusion of the learned court not only accords with plain natural justice, but is in harmony with the mining law and its authoritative exposition. The law of POSSESSION lies at its very foundation. Preceding the passage of any statute affirmatively authorizing the location of mineral lands, Congress, by an act approved February 27, 1865 (13 Stats., ch. 64, p. 441, now sec. 910, U. S. R. S.), provided:

"That no possessory action between individuals in "any of the courts of the United States for the re- "covery of any mining title, or for damages to any "such title, shall be affected by the fact that the para- "mount title to the land in which such mines are, is "in the United States, *but each case shall be adjudged* "*by the law of possession.*"

In *Jennison vs. Kirk*, 98 U. S., 453, 457, this court said:

"The discovery of gold in California was followed, "as is well known, by an immense immigration into "the State, which increased its population within "three or four years from a few thousand to several "hundred thousand. The lands in which the pre- "cious metals were found belonged to the United "States, and were unsurveyed, and not open, by law, "to occupation and settlement. Little was known of "them further than that they were situated in the "Sierra Nevada mountains. Into these mountains "the emigrants in vast numbers penetrated, occupy-

"ing the ravines, gulches and cañons, and probing "the earth in all directions for the precious metals. "Wherever they went, they carried with them that "love of order and system, and of fair dealing which "are the prominent characteristics of our people. In "every district which they occupied they framed cer- "tain rules for their government, by which the extent "of ground they could severally hold for mining was "designated, their possessory right to such ground se- "cured and enforced, and contests between them either "avoided or determined. These rules bore a marked "similarity, varying in the several districts only ac- "cording to the extent and character of the mines; dis- "tinct provisions being made for different kinds of "mining, such as placer mining quartz mining, and "mining in drifts or tunnels. They all recognize dis- "covery, followed by appropriation, as the foundation "of the possessor's title, and development by working "as the condition of its retention. And they were so "framed as to secure to all comers, within practicable "limits, absolute equality of right and privilege in "working the mines. Nothing but such equality "would have been tolerated by the miners, who were "emphatically the lawmakers, as respects mining, "upon the public lands in the State. The first ap- "propriator was everywhere held to have, within "certain well-defined limits, a better right than "others to the claims taken up; and in all con- "troversies except as against the Government, he was "regarded as the original owner, from whom title "was to be traced."

Congress having thus by the act of February 27, 1865, *supra*, recognized the law of *possession* in respect of mineral lands, and "the first appropriator" being thus recognized as first in right, the first section of the original mining act of July 26, 1866 (14 Stats., p. 251), must be read as in harmony therewith when it provided—

"That the mineral lands of the public domain, "both surveyed and unsurveyed, are hereby declared "to be free and open to exploration and *occupation*

"by all citizens of the United States and those who
"have declared their intention to become citizens,
"subject to such regulations as may be prescribed by
"law, *and subject also to the local customs or rules of*
"*miners* in the several mining districts, so far as the
"same may not be in conflict with the laws of the
"United States."

Here was express recognition of the law of priority of possession, as applied to all "the mineral lands of the public domain."

Succeeding sections of this act provided for purchase and patent from the United States of claims to "a vein or lode "of quartz or other rock in place, bearing gold, silver, cin-"nabar or copper. * * *"

Brief experience demonstrated that the right of purchase of the fee should be enlarged. Hence, Congress by an *amending* act of July 9, 1870 (16 Stats., p. 217), added several sections to the former act, and provided, *inter alia:*

"SEC. 12. That claims usually called 'placers,' in-
"cluding all forms of deposit, excepting veins of
"quartz, or other rock in place, shall be subject to
"entry and patent under this act, under like circum-
"stances and conditions, and upon similar proceed-
"ings, as are provided for vein or lode claims."

"Under like circumstances and conditions" implied prior location and possession by the placer claimant, for the former act of 1866, in express terms (sec. 2), imposed these requirements upon the claimant of the lode or vein as antecedent to the right of purchase, and such has always been the practical interpretation of the act.

The need for this enactment was strongly stated in the House by Representative Sargent, who, among other things, said:

"There is another objection to the present system.
"Capital, as is well known is always hesitating and

"cautious. The time when the miner could find a "claim which could be easily worked and would be "quickly remunerative is past. It is very rarely now "that gold is found glittering among the grass roots. "Most of the claims now worked are deep in the "bowels of the earth; old river channels covered up "by convulsions of nature, by mountains and lofty "hills; deposits which can only be reached by long "and expensive tunnels.

"Now, generally the miner is a poor man who can- "not with his own hands alone and without capital "construct the necessary works to develop his min- "ing claim. Consequently many promising mining "enterprises lie idle which, if they could be de- "veloped, would add greatly to the taxable wealth of "the country and stimulate its trade.

* * * * * * *

"As I have already said—and I repeat it, for I "wish to impress it upon the minds of gentlemen— "the day of easy mining is past. The gold which so "stimulates the business of the country, which en- "ables us to pay the interest on our debt, and in a "great degree to keep up our balance of exchanges in "the markets of the world, comes from long, hazard- "ous, or difficult enterprises, which require years of "labor and much capital in order that they may be "carried to a successful result."

*Cong. Globe, pt.* 3, 2*d sess.* 41*st Cong.*, p. 2028.

That such priority of location, lawfully initiated and maintained, gives priority of right and protects the holder thereof from the intrusion of another, the courts have uniformly declared.

Thus in *Belk vs. Meagher*, 104 U. S., 279, 283, 284, it was held:

"A mining claim perfected under the law is prop- "erty in the highest sense of that term, which may "be bought, sold and conveyed and will pass by "descent. * * * Mining claims are not open to "relocation until the rights of a former locator have

"come to an end. A relocator seeks to avail himself "of mineral in the public lands which another has "discovered. This he cannot do until the discoverer "has, in law, abandoned his claim and left the prop- "erty open for another to take up. The right of loca- "tion upon the mineral lands of the United States is "a privilege granted by Congress but it can only be "exercised within the limits prescribed by the grant. "Locations can only be made where the law allows "it to be done. Any attempt to go beyond that will "be of no avail. Hence, a relocation on lands "actually covered at the time by another valid and "subsisting location is void; and this not only "against the *prior locator*, but all the world, because "the law allows no such thing to be done."

In the case of *Gwillim vs. Donnellan*, 115 U. S., p. 45, the court holds (p. 49):

"A valid and subsisting location of *mineral lands*, "made and kept up in accordance with the provisions "of the statutes of the United States, has the effect of "a grant by the United States of the right of present "and exclusive possession of the lands located. If, "when one enters on land to make a location, there "is another location in full force, which entitles its "owner to the exclusive possession of the land, the "first location operates as bar to the second."

We do not think that any one would have the assurance to say that the location made by the grantors of the defendants in error was not a location of *mineral land*, and if it is a location of mineral lands which persons had a right to locate under the laws of the United States, then the opinion of the court is conclusive on this point.

Many other decisions by this court can be cited to the same effect, but we do not deem it necessary to take the time of the court to cite them, except on the point as to what is a *mining claim*, as contemplated by the statute.

The court, by Mr. Justice Field, in the case of *The St.*

*Louis Smelting and Refining Company vs. Kemp*, 104 U. S., 636, 649, in referring to the Starr placer, United States survey No. 255, and which is separated from the ground in controversy in this suit by a common line, says:

> "*A mining claim is a parcel of land containing* "*precious metal in its soil or rock.* * * * If the "miner has only the ground covered by one location, "his 'mining claim' and 'location' are identical "and the two designations may be indiscriminately "used to denote the same thing."

This definition has been approved by the supreme court of Colorado in the case of *Sweet vs. Webber*, 7 Colo., 443.

We call attention to this definition of a mining claim and location to show that this court has made no distinction between classes of mining claims or between placers and lode claims when it says that a valid location having been made it carries with it the exclusive right of possession, and that "mining ground when located becomes the property of the "locators and cannot be relocated until after they have lost, "abandoned, or forfeited their rights."

The United States circuit court for the southern district of California, in the case of *Nevada Sierra Oil Co. vs. Home Oil Co.*, 98 Fed. Rep., p. 673, decided in December, 1899, expressly holds that the law of "possessory rights, giving the locator of a *mining claim* the exclusive right thereto and rendering it no longer public domain, applies to *placer claims*, and on page 677 in the opinion of that court quotes from an opinion of the United States circuit court of appeals in the case of *Erwin vs. Perego*, 93 Fed. Rep., 611, as follows (the clause in parentheses is inserted by the court in the "Nevada Sierra Oil Co." case):

> "The acts of Congress prescribed two, and only "two, prerequisites to the vesting in a competent "locator of the complete possessory title to a lode "mining claim. (*And the same rule is by the statute* "*made applicable to placer mining claims.*) They are

"the discovery upon unappropriated public land of "the United States, within the limits of his claim, of "a mineral-bearing lode, and the distinct marking of "the boundaries of his claim, so that they can be "readily traced. No appropriation of the land is "made until both these requirements are fulfilled, "and until that time the lode and land sought are "open to location and appropriation by any compe- "tent locator; but, when these requirements have "been complied with, the land is *no longer public, but* "*the possession, the right to the possession, and the right* "*to acquire the title are irrevocably vested in the locator.*"

And as the supreme court of California, in the case of *Quigley vs. Gillett*, 101 Cal., 462, says, referring to a placer claim, it being a validly located placer mining claim:

"The ground located became the property of the "locators and could not be relocated until they lost, "abandoned or forfeited their rights to it."

In addition to the above, we find that the statutes of the State of Colorado contain the following, which appears for the first time in the revision of 1868, and now at section 3613 of Mills' Annotated Statutes:

"Any person settled upon any of the public lands "belonging to the United States may maintain tres- "pass *quare clausum fregit*, trespass ejectment, forcible "entry and detainer, unlawful detainer and forcible "detainer, for injuries done to the possession thereof."

Section 3617 of Mills' Annotated Statutes lays down the proposition that any person having any title to occupy a mining claim shall have the right to maintain any action to protect his possession of the same, and the supreme court of Colorado has, in *Armstrong vs. Lower*, 6 Colo., 393, followed the same rule as that adopted by the Supreme Court of the United States, in which case it is said:

"*Only the unoccupied and unappropriated mineral* "*lands of the General Government are subject to explora-* "*tion and location.*"

And further on in the opinion the court says:

> "To perfect a valid location, the prospector must "discover a vein or lode upon the *unoccupied* and *un-* "*appropriated* public domain of the United States."

And in the case of *Omar vs. Soper*, 11 Colo., 380, the court says:

> "It has been repeatedly held that only the unap- "propriated mineral lands of the United States are "open to exploration and location. No one can there- "fore lawfully enter upon the territory so claimed "during the period named, for the purpose of initi- "ating a claim thereto."

In the case of *McFeters vs. Pierson*, 15 Colo., 201, the court quotes, in giving the definition of a mining claim, the language heretofore quoted in the case of *Smelting Company vs. Kemp*, 104 U. S., 648, and says further on in the opinion that—

> "The lands thus located are spoken of as *mining* "*claims* and the locators as the *owners* thereof, antece- "dent to the entry for the Government patent. * * * "He is the owner before as well as after the issuance "of the Government patent, and is entitled to the "*exclusive possession* and enjoyment against every one, "including the United States itself."

Then the court in the last-cited case goes fully into the question, and decides that going upon the possession of one having a valid location of a mining claim is a trespass, and that no new right can be initiated thereon.

In the case of *Girard vs. Carson*, 22 Colo., 345, the same doctrine is laid down by the court in positive language.

The supreme court of the State of Colorado says plainly that provisions relating to "*mining*" claims apply equally to both lode and placer claims. (See the case of *Sweet vs. Webber et al.*, 7 Colo., pp. 443–447–450.) In this case it was confidently contended by counsel that section 2324, United

States Revised Statutes, which relates to the location of "*mining* claims," did not apply to placer claims. The court plainly points out that all provisions relating to "mining" claims apply equally to both lode and placer claims; and the court further points out, on page 449, that there is no difference in the law of "possessory rights" relating to lode claims and placer claims.

In *Stratton vs. Gold Sovereign M. & T. Co.*, 1 Mills' Leg. Adv., 350, complainant brought an action to restrain defendants from extending a tunnel through the claim of the former, which had been located prior to the date of the tunnel site. The defendants answered that they were driving such tunnel for the avowed purpose of discovering and claiming blind veins within the territory of complainant's claims. Complainant applied to Judge Hallett for a temporary injunction, which he granted, and, in the course of his opinion, said:

> "Chapter 6 of the Revised Statutes provides for "three kinds of locations on the public mineral "lands, which, in common speech, are called 'lode "locations,' 'tunnel locations,' and '*placer locations.*' "*When a location* has been properly made *in either* "*class*, and so long as it shall be fully maintained by "use and enjoyment, or by patent, the territory em- "braced in *such location is not subject to adverse lo-* "*cation by a claimant of the same class or any other* "*class*. The reason is that the territory covered by "such location has been severed from the public do- "main, and has become private property, which is no "longer open to a new appropriation."

In addition to the authorities above cited from this court and from the courts of the leading mining States, we wish to quote the opinion of the Commissioner of the General Land Office in the matter of the Zulu lode against the same Searl placer in controversy in the case at bar. The Commissioner states the facts wherein the right to locate a lode within this very placer location is claimed by an outsider so plainly and

shows so clearly that such an act by an outsider is a trespass that we quote his letter to the register and receiver at Leadville, May 31, 1881, in full, as follows:

"GENTLEMEN: On the fifth day of July, 1879, A. D. "Searl filed in your office an application for patent to "the Searl placer claim, designated as survey No. 435, "and gave due notice thereof in the manner pre- "scribed by law, the legal period of notice expiring "September 13, 1879. Prior to the last mentioned "date a number of adverse claims were filed, based "upon the location and discovery of lode claims "within the limits of or partially overlapping the "premises applied for; also, one by A. K. Updegraph, "county judge of Lake county, as trustee on behalf of "settlers for townsite purposes, who claim the same as "the townsite of North Leadville. Suits were com- "menced in pursuance of said adverse claims, and "the proceedings for patent have since remained sus- "pended in your office.

"On the fifth of April, 1881, Edward V. Lowe filed "an application for patent to the Zulu lode, survey "No. 1453, lying wholly within the exterior bound- "aries of the Searl placer, notice of which application "is now being published.

"The Zulu lode claim is based upon a location "made August 23, 1879, at which time the Searl ap- "plication for patent was pending in your office. The "certifiate of location recites that the lode was discov- "ered June 22, 1879.

"Section 2322, U. S. R. S., provides that the locators "of 'all mining locations heretofore made or which "'shall hereafter (from May 10, 1872) be made on any "'mineral vein, lode, or ledge situated on the public "'domain, their heirs and assigns, * * * *shall* "'*have the exclusive right of possession and enjoyment* "'*of all the surface included within the lines of their* "'*location*,' etc.

"Section 2329, R. S., provides that 'claims usually "'called "placers" including all forms of deposit, "'excepting veins of quartz or other rock in place, "'shall be subject to entry and patent under like "'circumstances and conditions, and upon similar

"'proceedings *as are provided for vein or lode claims;*
"'but where the lands have been previously surveyed
"'by the United States, the entry in its exterior
"'limits shall conform to the legal subdivision of
"'the public lands.'

"*The words 'circumstances and conditions' refer to*
"*location and maintenance of possessory title,* etc. One
"of the conditions attached by law to a lode claim
"is that the locator thereof, his heirs and assigns shall
"have exclusive possession of 'all the surface ground
"included within the lines of his location.'

"*The Searl placer, having been duly located, the owner*
"*thereof became entitled to the exclusive right of posses-*
"*sion of 'all of the surface ground included within the*
"*lines of his location.*' Therefore the entry upon
"said placer claim for the discovery of the Zulu
"lode, on the 22d day of June, 1879, was an illegal
"act. A location based upon such discovery is illegal.
"The location being illegal, all subsequent proceed-
"ings for patent are invalid.

"The existence of the Zulu lode within the Searl
"placer, however, is denied by the placer claimant.
"This is a question of fact affecting the rights and
"duties of Mr. Searl, the placer claimant, and should
"be determined by a hearing which you are directed
"to hold giving due notice to all parties in interest.
"The pending application of Mr. Lowe, for patent to
"the Zulu lode being illegal, is hereby dismissed, of
"which you will give due notice to all parties in in-
"terest, and allow sixty days for appeal.

"Very respectfully,
"(Signed) J. A. WILLIAMSON,
"*Commissioner.*"

We desire to call attention to the Commissioner's construction of section 2329, United States Revised Statutes, and to what he says with reference to the words "circumstances and conditions," and we insist that it is the only fair construction that can be put upon those words as they appear in the statute.

It would seem, therefore, that if one makes a valid placer

location in good faith upon the public domain, and thereafter performs the work required by law to hold such location, that he is entitled to all of the lodes which may afterward be discovered therein, unless by some overt act he waives his right to said lodes. The manner in which such waiver may be made is expressly provided by section 2333 of the United States Revised Statutes.

In the case at bar there is no showing or attempt made to show that the Searl placer claimants applied for a patent after the alleged discovery of lodes claimed by plaintiff in error, or that any waiver of any right to any of the lodes in controversy was ever made, because it is not contended and is not the fact, as shown by the record, that any lode was shown to exist or exposed within the placer claim of the defendants in error at the time their original application for patent was made, as hereinbefore set forth.

Opposing counsel assert that the supreme court of Colorado has ruled the case at bar in direct conflict with its former decision in *Mt. Rosa M. M. & L. Co. vs. Palmer*, 20 Colo., 56. In its first decision in this case (R., 69) that court states precisely what it *did* decide in the Mt. Rosa case, and concludes (R., 70):

> "It is obvious that the facts of the case in hand do "not bring it within the principles laid down in the "Mt. Rosa case. If, in the case at bar, the lode claims "were known to exist at the time of the entry of de- "fendant's grantors upon the Searl placer, under the "decision in the Mt. Rosa case the entry was not un- "lawful; but if on the contrary, the veins were then "unknown, by the same decision the right of posses- "sion of this ground belonged to the owners of the "placer location. Their right of possession included "these unknown veins and the entry for prospecting "was a trespass, and no title could thereby be in- "itiated."

In passing upon the petition for rehearing the court in its second opinion said (R., 87):

"The learned counsel for plaintiff in error were "permitted, *amici curiæ*, to file a brief in the Mt. "Rosa case, and we then had the benefit of their "learning and research, and the record in the case at "bar was before us when the opinion was prepared "by Mr. Justice Goddard. It was with full knowl- "edge of the issues herein and as particularly appli- "cable to the argument of this plaintiff in error made "in that case, which is the same as it is here, that the "following language found on page 61 was used :

"'While we recognize to its full extent the rule "'that precludes the initiation of a right through a "'trespass upon the lawful possession of another, we "'think, under the established facts in this case, ap- "'pellant is not in a position to invoke its protec- "'tion. The lodes in question were known to exist "'prior to the application for patent; and appellant, "'not having taken the necessary steps to obtain "'them, they were open to location by others at the "'time they were located by the grantors of appellee. "'In making the locations, no right of appellant was "'invaded, and their validity, therefore, is in no way "'affected by the fact that they were made within "'the surface boundaries of a prior placer location.'

"We then had in mind, as we do now, the distinc- "tion between the facts of that case and the case at "bar. There it was unquestioned that the lode "claims were known to exist within the limits of the "placer location before an application for patent for "the latter was made. In the case at bar, as we have "seen, the findings of fact of the trial court, which "upon this review are conclusive upon us, are that "the lode claims were not known to exist until long "after the application for the placer patent was filed. "The distinction is vital and the rule in the two cases "is different."

Opposing counsel (Brief, 37) insist that in its second opinion the supreme court of Colorado "shifted its ground" and "took refuge behind the abandoned and rejected applications for patent made by the owners of the Searl placer." The court did nothing of the kind and the learned counsel

singularly misapprehended the true meaning and position of the court, as can be readily shown.

Section 2333, United States Revised Statutes, provides:

> "Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section three hundred and eighty-eight, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim, which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

By section 2333 the failure of the placer claimant to include in his application for patent a "known vein or lode" is held as a "conclusive declaration" that he has no right thereto, and it is hence by operation of law excluded from his placer patent. Now, at the time Searl's original application for patent was made, on July 5, 1878, and again when his amended application for patent was made, on March 10, 1882, *this record affirmatively shows the lode claims here in suit were not so known to exist. Hence they could not be held excluded from his placer claim by reason of the applications then*

*made.* The fact that his applications for patent were *rejected* does not destroy his right to unknown lodes, nor justify the intrusion of third persons upon his surface ground seeking to find unknown lodes; or, in the language of the court below, "a prospector may not enter upon a prior placer location for the purpose of prospecting for or locating unknown "lodes or veins." Otherwise stated, the failure to include then unknown lodes at the time of Searl's rejected placer applications did not thereafter give the right to a prospector to enter upon his possession to seek to find *unknown* lodes. This is so clearly the meaning of the court that we do not need to discuss that matter further.

In the Mt. Rosa case the supreme court of Colorado said:

> "While we recognize to its full extent the rule that "precludes the initiation of a right through a trespass "upon the lawful possession of another, we think "under the established facts in this case, appellant is "not in a position to invoke this protection."

But in the case at bar defendants in error are in a position to invoke its protection, and always have been, because they never waived any right whatsoever to any pretended lode of plaintiff in error, as the Mt. Rosa placer claimants did. In addition, in the Mt. Rosa case it does not appear from any source but that the lodes that were located within the placer claim protruded from the ground or were exposed at the time of the location of the placer.

In the case at bar (R., 39) it appears that one J. K. Carleton testified that he believed that there was one large mineral-bearing vein which underlaid the whole of said placer, dipping under the same, and that he knew of *evidence* of said vein extending under said placer, from workings in the Lucy B. Hussey and other lodes, as far back as 1881. This is the strongest evidence produced, which the court below evidently did not believe much of, which shows that four years after the location of the placer in question the most

that was known was Carleton's belief that the vein ran underneath the placer.

In *Dahl vs. Raunheim*, 132 U. S., 230, 261, it was expressly held that such lode discovery on adjacent land raised no presumption of the existence of a vein or lode within the placer claim.

It further appears (R., 39) that the witnesses Newell, Doyle, and Carleton testified that said lode or vein had "since 1895" been traced and discovered under the placer, which is the only evidence, as appears in the record, that any vein was ever discovered within the boundaries of the placer claim; and by referring to the record we find that this adverse suit was begun in 1893. But indeed, as far as the record shows, and as far as there was any evidence before the court, no discovery of any lode was ever made by plaintiff in error within the boundaries of the placer claim until 1895, long after this suit was begun and long after their application for a patent. The evidence which we have referred to shows that the attempted locations of the plaintiff in error were made upon the placer claim in question by excavating the wash or placer dirt on the surface of said placer, and in all probability that was one of the grounds for the decision of the court below; and as the evidence is not all preserved in the bill of exceptions, this court will presume that there was evidence sufficient to sustain the findings of the court below, and that any discovery made by the plaintiff in error or its grantor was made by the entry upon the possession of the defendants in error and by digging and excavating the earth within the boundaries of the claim of the defendants in error to which they had the exclusive right of possession; and, if such was the fact, we do not believe that this court will hold that any right could be initiated by such action.

Much stress is laid by opposing counsel upon the decision of Mr. Secretary Smith in *Aurora Lode vs. Bulger Hill* and *Nugget Gulch* Placer, 23 Land Decisions, 95, as supporting their contention. It is most pertinent to note that the cited

case was before this court under the title of *Bennett vs. Harkrader*, 158 U. S., 441, cited *supra*, wherein this court sustained the verdict and judgment below upon the adverse claim suit awarding the placer applicant possession, with resulting preference right of purchase. The effect of that judgment was, however, wholly defeated by the later decision of Secretary Smith upon the theory that the case as so adjudicated did not authorize the successful claimant therein to enter the land as placer ground because of the existence of a known lode, which he did not seek to purchase *as such* under his judgment-roll. We do not find it necessary to discuss that decision *in extenso*, because the court below in its opinion clearly and concisely states its plain meaning and legal effect thus (R., 86):

> "Counsel insists that we have misconstrued the "decisions in the cases of the Aurora lode and the "Mt. Rosa Company, upon which we commented in "the former opinion. We have given attentive con- "sideration to their argument in that behalf, and "after carefully re-reading the opinions are satisfied "that we have not misconceived their effect. In the "syllabus of the Aurora case it is said that the loca- "tion of a mining claim 'does not operate to give "'title or right of possession to veins or lodes within "'its limits, or preclude the right of discovery and "'location thereof by others.' This language seems "to be taken substantially from what is said in the "opinion of the Secretary of the Interior at page 101 "of the official report. The statement, removed "from its proper setting, may be broad enough to "include unknown, as well as known, veins or lodes; "but considered, as it should be, in connection with "the context, it is clear that the Secretary intended "it to apply only to known lodes, for he expressly "says, in speaking of the general rule, if the veins or "lodes were 'not known to exist at that date (*i. e.*, "'when patent for placer claim is applied for), the "'placer patent will carry the title to them.'
>
> "This can mean nothing else than that, if lodes or "veins are not known to exist within the limits of a

"placer location at the time when patent for the
"latter is applied for, they belong to the placer claim-
"ant, and one may not thereafter make an entry
"upon the placer claim for the purpose of discovering
"and locating them. But if the decision of the Sec-
"retary of the Interior in this case can, by any canons
"of construction, be considered authority for the con-
"tention of the plaintiff in error here that a prospec-
"tor may, without restriction, within the limits of a
"prior valid placer claim prospect for, and thereafter
"lawfully locate, lodes not known to exist at the time
"of the application for a placer patent, its binding
"effect would seem to be overcome by the decision of
"the Supreme Court of the United States in *Bennett*
"*vs. Harkrader*, 158 U. S., 441, and in many other
"decisions of that and other courts."

Indeed, our learned friends, in citing cases which are undoubted law, wholly fail to distinguish the *facts* of the case at bar from the basic facts necessarily involved in the cases thus cited. It has been repeatedly held that *known* lodes within placer claims are excepted from placer application and patent unless specifically described and applied for. That is the clear provision and intendment of section 2333. *But* neither the mining statute nor any adjudicated case thereunder has held that lodes *not* known are within the exception or the meaning of the statute. Certainly no case to this writing has held that the possession of the placer claimant may be invaded by strangers for the purpose of delving in the earth to hunt for *unknown* lodes, which *may* underlie the surface and which can only be discovered and made known by such exploitation. *That* is the governing distinction, and we submit the supreme court of Colorado, on the established facts of this case, *has* correctly apprehended the distinction and has also correctly ruled the law thereon.

The *dicta* of Secretary Smith in the Aurora Lode case, if followed to its legitimate results, in many instances would

abrogate the statutes of the United States with reference to the location and ownership of placer claims.

According to such *dicta*, and according to some of the statements of Mr. Lindley in his work, a location of a placer claim can be made upon the public mineral domain of the United States, such as has been made in the case at bar, and on ground adjoining it. The location may contain valuable placer dirt to the depth of several hundred feet, and for anything that is known by the locator at the time of the location no vein or lode of any kind or description be contained therein; but there may be a deposit or lode at a depth beneath the surface of 500 or 600 feet or 200 or 300 feet—at least to such a depth that neither the locator nor the witness Carleton could actually see, because we have heard it frequently stated in connection with mining that no one could actually see into the ground. The placer locator has made his location in good faith, perfected it, and kept up his assessment work, but has not applied for a patent therefor (and no one will contend that it is his duty to ever apply for a patent or that his title becomes any weaker by reason of the fact that he does not apply for or procure a patent. See *Chapman vs. Toy Lung*, 4 Sawyer, page 28; and *Gillis vs. Downey*, C. C. A., 85 Fed., 483). Years afterward, or indeed at any time afterward, developments at some other point lead the general public, or a considerable number of individuals, to believe that underneath the valid placer claim there is such a lode or deposit. Notwithstanding the fact that the placer claimant is entitled to possession, a great army of people go upon his ground and sink shafts fifty feet apart, which, according to Secretary Smith, they have a right to do, until such a depth is gained that the underground lode or deposit is uncovered and disclosed, and locations are made thereon by the trespassers, each fifty feet in width and 1,500 feet in length—the length of the lode claims being the same as the width of the placer claim. Each and all of the locators have sunk through the

placer deposits or placer gravel in initiating his lode right. Each of the trespassers who sinks a shaft is entitled, according to Secretary Smith and Mr. Lindley, to his fifty feet, and each claim side lines with another. The entire surface is covered with such locations, and patents are obtained so that the valid location of the placer claimant and his right of possession and his placer ground has been entirely obliterated, and what all the courts of last resort have declared to be his property is vanished in air. We submit that this is not an overdrawn case of what can or may occur at any time if the erroneous doctrine announced by Secretary Smith and by Mr. Lindley is carried to its legitimate conclusion; and it is neither more nor less than is being attempted to be done in the case at bar by plaintiff in error and its grantors, the only difference being that they claim the locations 300 feet wide, and by them are attempting to obliterate the placer claim that has been found by the court below to be a valid placer claim and to have remained such for more than thirteen years before they entered upon it, and for at least eighteen years before any of the alleged lodes were dis covered or disclosed.

Such being the case, the absurdity of the contention of the plaintiff in error we think appears fully.

So that in the case at bar we have no *res adjudicata*, so declared by the Land Department; so found as a matter of fact by the Land Department; so found as a matter of fact by the courts below, and we have no evidence in the record which shows that any right was or could have been initiated to the ground in controversy by plaintiff in error except by a trespass, and that no waiver of any right to any of the ground in controversy has ever been made by the defendants in error.

In concluding this point, we call the attention of the court to the fact that the record in this case does not set forth the evidence. This court, therefore, will not inquire

whether there was any evidence tending to show that the defendants in error did not have a valid placer location. It is not necessary to review the cases in which this court and all of the appellate courts have uniformly stated that where the record does not present a transcript of *all of the evidence*, the appellate court will presume that the evidence was such as to support the judgment of the court below.

The evidence shown by the record supports the findings and judgment of the court below; no evidence has been shown to support a judgment for plaintiff in error; but were it otherwise, in the absence of a bill of exceptions showing all of the evidence, it must be presumed by this court that there was sufficient evidence to support the judgment of the court below, and the judgment should be affirmed.

## III.

### RIGHT OF PLACER CLAIMANT TO ADVERSE AN APPLICATION FOR LODE PATENT.

Opposing counsel deny such right, although it was squarely recognized by this court in *Bennett vs. Harkrader*, 158 U. S., 441, and the verdict and judgment below awarding right of possession and consequent right to purchase the fee to the placer claimant affirmed. That case was not thus ruled by any possible misunderstanding or oversight. The precise point was directly raised in that case by the plaintiff in error on the brief of his counsel (p. 8), and under proper assignment of error, thus:

> "The plaintiff was claiming the premises by virtue "of a placer location. The defendants were claim- "ing the same as a lode location; therefore the "plaintiff had no right whatever to this ground as "against any intervening rights which a defendant "may have acquired by virtue of a lode location on "the same ground. So that the material part of this "refused instruction is found in the latter portion

"thereof and correctly embodies the legal principle "involved, namely, that if a lode location had inter- "vened as against a placer location, the lode location "would be the superior title."

Clearly, then, this court has advisedly ruled against the contention here made by plaintiff in error.

But opposing counsel contend that in respect of mineral lands "the lode claim was the standard;" that the placer claimant could adverse only upon the single ground of denial of existence of the lode claim, and of that question, says counsel, the Land Department alone has jurisdiction to inquire. We do not so read the law. This court has not so expounded it. *Contra*, as clearly ruled in *Shoshone Mining Co. vs. Rutter*, 177 U. S., 505, 511, and quoted fully *supra* under the mining law, upon an adverse claim suit "not merely questions of law under the statutes of the United "States, but questions of *fact* and questions arising under "local rules and customs and State statutes are open for "consideration."

Under the mining law (sec. 2326, U. S. R. S.) the question sent to the courts to be there litigated upon the adverse claim suit is "the question of the right of possession." The judgment rendered on *that* question controls the United States Land Department, for "after the decision they are "governed by it."

*Richmond Mining Co. vs. Rose*, 114 U. S., 576, 585.

If, then, the lode claimant has wrongfully intruded upon the prior placer claimant, certainly such trespass cannot *create* a right. As certainly *that* is matter of adverse claim, and suit for it is of the essence of "the question of the *right* "of possession." As certainly this court has so decided, for the verdict and judgment sustained in *Bennett vs. Harkrader*, *supra*, in favor of the placer adverse claimant involved in its necessary conclusion the finding that the placer claimant

was in rightful possession and had been wrongfully ousted therefrom by the lode-claim applicant.

Notwithstanding the severe criticism indulged by counsel for plaintiff in error against the decisions and judgment of the supreme court of Colorado in the case at bar, we confidently submit that learned court has correctly ruled the law upon the facts established by this record. The views of text writers, however eminent, which are quoted so freely as in asserted contradiction thereof, do not convince us that the court has mistaken the purpose and meaning of Congress. Indeed, running all through the comments of the learned authors thus cited, there is plainly expressed and meant that *known* lodes located and held as such are excepted from the placer location and claim. *Nowhere* is there any suggestion that unknown lodes within placer claims are subject to exploitation and adverse entry by the prospector who cannot know, but hopes only by development beneath the surface to uncover and discover, what is at the moment of his entry an *unknown* lode. Congress did not mean to authorize such trespass, for it could readily appropriate the *whole* of the placer claim, oust the placer claimant, and by subterranean exploitation *discover* what was wholly unknown, wholly hidden from the surface, while the overlying placer deposit may be rich in placer gold.

The contention of counsel that there are degrees or grades of possessory title upon the public mineral domain is not supported by sound reasoning nor by the test of experience. The world's supply of gold in the United States, including Alaska, in South Africa, and elsewhere, has been and is largely furnished by placer mining. It has been and remains the pioneer of gold mining. It precedes the discovery of the mineral in vein or lode deposit. Certainly the law did not intend to offer the placer miner and locator the assurance of exclusive possession and at the same time authorize his possession to be invaded, in whole or in part, by strangers seeking to appropriate against him not *known* lodes (to

which alone section 2333, U. S. R. S. relates), but unknown lodes, hidden deep beneath the surface, and which must by development be uncovered and *discovered*. Such construction of the law would be a reproach.

Counsel ask what the adverse claimant here can get under the prior placer location upon affirmance of this judgment? The inquiry begs the whole case. The question which stands here for judgment is the right of possession. If that has been wrongfully invaded, the trespass cannot ripen into a legal right on the part of this plaintiff in error to appropriate what has been thus wrongfully taken. It is the common law of the land and the especial provision of the mining law as expounded by this court, that a claim initiated in trespass and without right is *void*. Thereunder the wrongdoer can take nothing. What the rightful owner may do is not open to the trespasser to question, nor can it authorize a judgment in his favor. If, as we contend, the plaintiff in error is not entitled to the right of possession, we are entitled to the judgment. What may be done thereafter as between the adverse claimant and the United States is not a matter in which he has any lawful interest or right to inquire.

We submit the judgment of the supreme court of Colorado was right and should be affirmed.

Respectfully submitted.

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# Supreme Court of the United States.

No. 76.—October Term, 1903.

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| The Clipper Mining Company, Plaintiff in Error, *vs.* The Eli Mining and Land Company, A. D. Searl, F. C. Schroeder, A. F. Britton and H. J. Gray. | In error to the Supreme Court of the State of Colorado. |

[May 2, 1904.]

On December 12, 1877, A. D. Searl and seven associates made a location of placer mining ground near the new mining camp of Leadville. The claim embraced at that time 157.02 acres of land. The original locators shortly conveyed all their interest to A. D. Searl, who applied for a patent on July 5, 1878. The application was met at the land office with a multitude of adverse claims. Settlements were made with some of the contestants, and on November 10, 1882, an amended application for patent was filed, including only $101\frac{916}{1000}$ acres. This application was rejected by the Commissioner of the General Land Office on March 6, 1886, and his decision was affirmed by the Secretary of the Interior on November 13, 1890. On November 25, 1890, four lode claims, known as the Clipper, Castle, Congress and Capital, were located by parties other than the owners of the placer claim within the exterior boundaries of that claim. These four lode claims became by mesne conveyances the property of the Clipper Mining Company. It applied for a patent, and on November 23, 1893, the defendants in error, as the owners of the Searl placer location, filed an adverse claim and commenced this action in the District Court of Lake County, in support of that claim. Judgment was rendered in favor of the plaintiffs, which was affirmed by the Supreme Court of the State, (29 Col. 377,) and thereafter this writ of error was sued out.

Mr. Justice Brewer delivered the opinion of the Court.

The location of the placer mining claim and both the original and amended applications for patent thereof were long prior to the locations of the lode claims, and the contention of the plaintiffs is, that they, by virtue of their location, became entitled to the exclusive possession of the surface ground; that the entry of the lode discoverers was tortious and could not create an adverse right, even though by means of their entry and explora-

tions they discovered the lode claims. The defendant, on the other hand, contends that the original location of the placer claim was wrongful, for the reason that the ground included within it was not placer mining ground; that the intent of the locators was not placer mining but the acquisition of title to a large tract of ground contiguous to the new mining camp of Leadville, and likely to become a part of the townsite. In fact, it was thereafter included within the limits of the town, and on it streets and alleys have been laid out and many houses built and occupied by individuals claiming adversely to the placer location.

It is the settled rule that this court, in an action at law at least, has no jurisdiction to review the conclusions of the highest court of a State upon questions of fact. (*River Bridge Co.* v. *Kansas Pac. Ry. Co.*, 92 U. S. 315; *Dower* v. *Richards*, 151 U. S. 658; *Israel* v. *Arthur* 152 U. S. 355; *Noble* v. *Mitchell*, 164 U. S. 367; *Hedrick* v. *Atchinson &c. Railroad*, 167 U. S. 673–677; *Turner* v. *New York*, 168 U. S. 90–95; *Egan* v. *Hart*, 165 U. S. 188.) It must, therefore, be accepted that the Searl placer claim was duly located, that the annual labor required by law had been performed up to the time of the litigation, that there was a subsisting valid placer location, and that the lodes were discovered by their locators within the boundaries of the placer claim subsequently to its location. So the trial court specifically found, and its finding was approved by the Supreme Court.

As against this, it is contended that the Land Department held that the ground within the Searl location was not placer mining ground, nor subject to entry as a placer claim, that such holding by the department must be accepted as conclusive in the courts, and therefore that the tract should be adjudged public land and open to exploration for lode claims and to location by any discoverer of such claims. It is true that the Commissioner of the General Land Office, in rejecting the amended application for the placer patent, said that he was not satisfied that the land was placer ground or that the requisite expenditure had been made, and further that the locators had not acted in good faith, but were attempting to acquire title to the land on account of its value for townsite purposes and for the lodes supposed to be contained therein. This decision was affirmed by the Secretary of the Interior; but notwithstanding this expression of opinion by these officials, all that was done was to reject the application for a patent. As said thereafter by the Secretary of the Interior upon an application of the Clipper Mining Company for a patent for the lode claims here in dispute:

"The judgment of the department in the Searl placer case went only to the extent of rejecting the application for patent. The department did not assume to declare the location of the placer void, as contended by counsel, nor did the judgment affect the possessory rights of the contestant to it." (22 L. D. 528.)

So far as the record shows—and the record does not purport to contain all the evidence—the placer location is still recognized in the department as a valid location. Such also was the finding of the court, and being so there is nothing to prevent a subsequent application for a patent and further testimony to show the claimant's right to one. Undoubtedly when the department rejected the application for a patent it could have gone further and set aside the placer location, and it can now, by direct proceedings upon notice, set it aside and restore the land to the public domain. But it has not done so, and therefore it is useless to consider what rights other parties might then have.

The fact that many years have elapsed since the original location of the placer claim and that no patent has yet been issued therefor does not affect its validity, for it is a well-known fact, as stated by the Court of Appeals in *Cosmos Exploration Company* v. *Gray Eagle Company*, (112 Fed. Rep. 4, 16,) that "some of the richest mineral lands in the United States, which have been owned, occupied and developed by individuals and corporations for many years, have never been patented."

The views entertained by the Supreme Court of the law applicable to the facts of this case are disclosed by the following quotation from its opinion. After referring to one of its previous decisions, known as the Mt. Rosa case, it said:

"If, in the case at bar, the lode claims were known to exist at the time of the entry of defendant's grantors upon the Searl placer, under the decision in the Mt. Rosa case the entry was not unlawful; but if, on the contrary, the veins were then unknown, by the same decision the right of possession of this ground belonged to the owners of the placer location. Their right of possession included these unknown veins and the entry for prospecting was a trespass, and no title could thereby be initiated.

* * * * * *

"Our conclusion, therefore, is that one may not go upon a prior valid placer location to prospect for unknown lodes and get title to lode claims thereafter discovered and located in this manner and within the placer boundaries, unless the placer owner has abandoned his claim, waives the trespass, or by his conduct is estopped to complain of it. If the trial court intended to rule that in no circumstances may one, before application for a patent of a placer claim, go upon the ground within its exterior boundaries for the purpose of locating a lode, it went too far; yet as general language in an opinion must be taken in connection with the facts of the particular case, the ruling here should be limited to the facts disclosed by the record, and no prejudicial error was committed. For, under the authorities, a prospector may not enter upon a prior placer location for the purpose of prospecting for, or locating, unknown lodes or veins; and to uphold the judgment we must presume that the evidence before the trial court showed that the veins or lodes upon which the defendant's grantors based their locations were unknown when they entered upon the Searl placer for the purpose of prospecting."

The law under which these locations were all made is to be found in chap. 6 of Title 32 Rev. Stat. Section 2319 of that chapter reads:

"All valuable mineral deposits of lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase."

Section 2320 provides for the location of mining claims upon veins or lodes.

By section 2322 it is provided that—

"The locators of all mining locations . . . on any mineral vein, lode or ledge, situated on the public domain, . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."

And by section 2329:

"Claims usually called 'placers,' including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims."

Section 2333 is as follows:

"Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

It will be seen that section 2322 gives to the owner of a valid lode location the exclusive right of possession and enjoyment of all the surface included within the lines of the location. That exclusive right of possession forbids any trespass. No one without his consent, or at least his acquiescence, can rightfully enter upon the premises or disturb its surface by sinking shafts or otherwise. It was the judgment of Congress that, in order to secure the fullest working of the mine and the complete development of the mineral property, the owner thereof should have the undis-

turbed possession of not less than a specified amount of surface. That exclusive right of possession is as much the property of the locator as the vein or lode by him discovered and located. In *Belk* v. *Meagher*, (104 U. S. 279, 283,) it was said by Chief Justice Waite that "A mining claim perfected under the law is property in the highest sense of that term;" and in a later case, *Gwillim* v. *Donnellan*, (115 U. S. 45, 49,) he adds:

"A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as a bar to the second."

In *St. Louis Mining Co.* v. *Montana Mining Co.*, (171 U. S. 650, 655,) the present Chief Justice declared that "where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator." Nor is this "exclusive right of possession and enjoyment" limited to the surface, nor even to the single vein whose discovery antedates and is the basis of the location. It extends (so reads the section) to "all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." In other words, the entire body of ground, together with all veins and lodes whose apexes are within that body of ground, becomes subject to an exclusive right of possession and enjoyment by the locator. And this exclusive right of possession and enjoyment continues during the entire life of the location, or, in the words of Chief Justice Waite, just quoted, while there is "a valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States." There is no provision for, no suggestion of a prior termination thereof.

By section 2329, placer claims are subject to entry and patent "under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims." The purpose of this section is apparently to place the location of placer claims on an equality both in procedure and rights with lode claims. If there were no other legislation in respect to placer claims the case before us would present little doubt, but following this are certain provisions, those having special bearing on the case before us being found in section 2333. Parties obtaining a patent for a lode claim must pay $5 an acre for the surface ground while for a placer claim the government only charges $2.50 an acre. By section 2333 it is provided that one who is in possession of a placer claim and also of a lode claim included within the boundaries of the placer claim shall, on making application for a patent, disclose the fact of the lode claim within the

boundaries of the placer, and upon the issue of the patent payment shall be made accordingly; that if the application for the placer claim does not include an application for a vein or lode claim known to exist within the boundaries of the placer it shall be construed as a conclusive declaration that the placer claimant has no right of possession of that vein or lode; and further, that where the existence of a vein or lode within the boundaries of a placer claim is not known the patent for the placer claim shall convey all valuable mineral and other deposits within its boundaries.

A mineral lode or vein may have its apex within the area of a tract whose surface is valuable for placer mining, and this last section is the provision which Congress has made for such a case. That a lode or vein, descending as it often does to great depths, may contain more mineral than can be obtained from the loose deposits which are secured by placer mining within the same limits of surface area, naturally gives to the surface area a higher value in the one case than the other, and that Congress appreciated this difference is shown by the different prices charged for the surface under the two conditions. Often the existence of a lode or vein is not disclosed by the placer deposits. Hence ground may be known to be valuable and be located for placer mining, and yet no one be aware that underneath the surface there is a lode or vein of greater value. A placer location is not a location of lodes or veins underneath the surface, but is simply a claim of tract or parcel of ground for the sake of loose deposits of mineral upon or near the surface. A lode or vein may be known to exist at the time of the placer location or not known until long after a patent therefor has been issued. There being no necessary connection between the placer and the vein Congress by the section has provided that in an application for a placer patent the applicant shall include any vein or lode of which he has possession, and that if he does not make such inclusion the omission is to be taken as a conclusive declaration that he has no right of possession of such vein or lode. If, however, no vein or lode within the placer claim is known to exist at the time the patent is issued, then the patentee takes title to any which may be subsequently discovered.

While by the statute the right of exclusive possession and enjoyment is given to a locator, whether his location be of a lode claim or a placer claim, yet the effect of a patent is different. The patent of a lode claim confirms the original location, with the right of exclusive possession, and conveys title to the tract covered by the location together with all veins, lodes and ledges which have their apexes therein, whereas the patent to the placer claim, while confirming the original location and conveying title to the placer ground, does not necessarily convey the title to all veins, lodes and ledges within its area. It makes no difference whether a vein or lode within the boundaries of a lode claim is known or unknown, for the locator

is entitled to the exclusive possession and enjoyment of all the veins and lodes and the patent confirms his title to them. But a patent of a placer claim will not convey the title to a known vein or lode within its area unless that vein or lode is specifically applied and paid for.

It is contended that because a vein or lode may have its apex within the limits of a placer claim a stranger has a right to go upon the claim, and by sinking shafts or otherwise explore for any such lode or vein, and on finding one obtain a title thereto. That, with the consent of the owner of the placer claim, he may enter and make such exploration, and if successful, obtain title to the vein or lode, cannot be questioned. But can he do so against the will of the placer locator? If one may do it, others may, and so the whole surface of the placer be occupied by strangers seeking to discover veins beneath the surface. Of what value then would the placer be to the locator? Placer workings are surface workings, and if the placer locator cannot maintain possession of the surface he cannot continue his workings. And if the surface is open to the entry of whoever seeks to explore for veins, his possession can be entirely destroyed. In this connection it may be well to notice the last sentence in section 2322. That section, from which we have just quoted, is the one which gives a locator the right to pursue a vein on its dip [redacted] outside the vertical side lines of his location. The sentence, which is a limitation on such right, reads: "And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

It would seem strange that one owning a vein and having a right in pursuing it to enter beneath the surface of another's location should be expressly forbidden to enter upon that surface if at the same time one owning no vein and having no rights beneath the surface is at liberty to enter upon that surface and prospect for veins as yet undiscovered.

We agree with the Supreme Court of Colorado as to the law when it says that "one may not go upon a prior valid placer location to prospect for unknown lodes and get title to lode claims thereafter discovered and located in this manner and within the placer boundaries, unless the placer owner has abandoned his claim, waives the trespass, or by his conduct is estopped to complain of it." Perhaps if the placer owner, with knowledge of what the prospectors are doing, takes no steps to restrain their work and certainly if he acquiesces in their action, he cannot after they have discovered a vein or lode assert right to it, for, generally, a vein belongs to him who has discovered it, and a locator permitting others to search within the limits of his placer ought not thereafter to appropriate that which they have discovered by such search.

The difficulty with the case presented by the plaintiff in error is, that under the findings of fact, we must take it that the entries of the locators of these several lode claims upon the placer grounds were trespasses, and as a general rule no one can initiate a right by means of a trespass. (*Atherton* v. *Fowler*, 96 U. S. 513; *Trenouth* v. *San Francisco*, 100 U. S. 251; *Haws* v. *Victoria Copper Mining Company*, 160 U. S. 303.) See also *Cosmos Exploration Company* v. *Gray Eagle Company*, *supra*, in which the court said (p. 17):

"No right can be initiated on government land which is in the actual possession of another by a forcible, fraudulent or clandestine entry thereon. *Cowell* v. *Lammers*, (C. C.) 21 Fed. Rep. 200, 202; *Nevada Sierra Oil Co.* v. *Home Oil Co.*, (C. C.) 98 Fed. Rep. 674, 680; *Hosmer* v. *Wallace*, 97 U. S. 575, 579; *Trenouth* v. *San Francisco*, 100 U. S. 251; *Mower* v. *Fletcher*, 116 U. S. 380, 385, 386; *Haws* v. *Mining Company*, 160 U. S. 303, 317; *Nickals* v. *Winn*, 17 Nev. 188, 193; *McBrown* v. *Morris*, 59 Cal. 64, 72; *Goodwin* v. *McCabe*, 75 Cal. 584, 588; *Rourke* v. *McNally*, 98 Cal. 291."

If a placer locator is, as we have shown, entitled to the exclusive possession of the surface, an entry thereon against his will, for the purpose of prospecting by sinking shafts or otherwise, is undoubtedly a trespass, and such a trespass cannot be relied upon to sustain a claim of a right to veins and lodes. It will not do to say that the right thus claimed is a right to something which belongs to the United States and which will never belong to the placer locator, unless specifically applied and paid for by him, and therefore that he has no cause of complaint; for if the claim of the lode locator be sustained it carries under sections 2320 and 2333 at least twenty-five feet of the surface on each side of the middle of the vein. Further, if there be no prospecting, no vein or lode discovered until after patent, then the title to all veins and lodes within the area of the placer passes to the placer patentee and any subsequent discovery would enure to his benefit.

Again, it is contended that the claims which the defendant sought to patent were lode claims; that the only title set up in the complaint in the adverse suit was a placer title, and that a placer claimant has no standing to maintain an adverse suit against lode applications. In support of this is cited 2 Lindley on Mines, section 721, in which the author says:

"Where an application for a patent to a lode within the limits of a placer is made by a lode claimant, if the placer claimant asserts any right to the lode, he is necessarily called upon to adverse. Where his claim, however, is placer, pure and simple, under which claim he cannot lawfully assert a right to the lode, he has nothing upon which to base an adverse claim, unless the lode is entirely without the placer, and the controversy is confined to a conflicting surface, or the lode claimant seeks to acquire more surface than the law permits."

We do not think the author's language is to be taken as broadly as counsel contend. Under the statutes a lode claim carries with it the right to a certain number of acres, and where one is in peaceable possession of a valid placer claim, if a stranger forcibly enters upon that claim, discovers and locates a lode claim within its boundaries, and then applies for a patent, surely the placer claimant has a right to be heard in defence of his title to the ground of which he has been thus forcibly dispossessed. If the application for a patent of the lode claim is not adversed it will pass to patent, and it may well be doubted whether the placer claimant could, after the issue of a patent under such circumstances, maintain an equitable suit to have the patentee declared the holder of the legal title to the ground for his benfit. If the placer claimant can be thus deprived of his possession and title to a part of his ground he may be in like manner dispossessed of all by virtue of many forcible trespasses and lode discoveries.

The amount of land embraced in this placer location was about one hundred acres, while the land claimed under the several lode locations was a little over thirty-five acres. Can it be that the placer claimant had no right to be heard in court respecting the claim of the lode claimants to so large a portion of the placer ground?

We must not be understood to hold that, because of the judgment in this adverse suit in favor of the placer claimants, their right to a patent for the land is settled beyond the reach of inquiry by the government, or that the judgment necessarily gives to them the lodes in controversy. In 2 Lindley on Mines, sec. 765, the author thus states the law:

"Notwithstanding the judgment of the court on the question of the right of possession, it still remains for the Land Department to pass upon the sufficiency of the proofs, to ascertain the character of the land, and determine whether or no the conditions of the law have been complied with in good faith."

In 4 L. D. 316, Mr. Justice Lamar, then Secretary of the Interior, said in respect to this question:

"Does the judgment of a court as to which of two litigants has the better title to a piece of land bind the Commissioner to say, without judgment, or contrary to his judgment, that the successful litigant has complete title and is entitled to patent under the law? The usual result following a favorable judgment in a court under section 2326 of the Revised Statutes is, I doubt not, the issue of patent in due time, but in such case the final passing of title is not on the judgment of the court independent of that of the Commissioner, but is on the judgment of the latter pursuant to that of the former, and on certain evidence supplemental to that furnished by the judgment roll.

"The judgment of the court is, in the language of the law, 'to determine the question of the right of possession.' It does not go beyond that.

When it has determined which of the parties litigant is entitled to possession, its office is ended, but title to patent is not yet established.

"The party thus placed in possession may 'file a certified copy of the judgment roll with the register and receiver.' But this is not all. He may file 'the certificate of the surveyor general that the requisite amount of labor has been performed or improvements made thereon.' Why file this, or anything further, if the judgment roll settles all questions as to title and right to patent? Clearly, because the law vests in the Commissioner the authority and makes it his duty to see that the requirements of law relative to entries and granting of patents thereunder shall have been complied with before the issue of patent. His judgment should therefore be satisfied before he is called upon to take final action in any case. In this case, the judgment of the court ended the contest between the parties and determined the right of possession. The judgment roll proves the right of possession only. The applicant must still make the proof required by law to entitle him to patent. (*Branagan et al.* v. *Dulaney*, 2 L. D. 744.) The sufficiency of that proof is a matter for the determination of the Land Department."

This opinion was cited as an authority by this court in *Perego* v. *Dodge*, (163 U. S. 160, 168.) See also *Aurora Lode* v. *Bulger Hill Nugget Gulch Placer*, (23 L. D. 95, 103.) The land office may yet decide against the validity of the lode locations and deny all claims of the locators thereto. So also it may decide against the placer location and set it aside, and in that event all rights resting upon such location will fall with it.

Finally, we observe that the existence of placer rights and lode rights within the same area seems to have been contemplated by Congress, and yet full provision for the harmonious enforcement of both rights is not to be found in the statutes. We do not wonder at the comment made by Lindley, (1 Lindley, 2d. ed. sec. 167,) that "the townsite laws, as they now exist, consist simply of a chronological arrangement of past legislation, an aggregation of fragments, a sort of 'crazy quilt,' in the sense that they lack harmonious blending. This may be said truthfully of the general body of the mining laws." Many regulations of the Land Department and decisions of courts find their warrant in an effort to so adjust various statutory provisions as to carry out what was believed to be the intent of Congress and at the same time secure justice to miners and those engaged in exploring for mines. If we assume that Congress, recognizing the coexistence of lode and placer rights within the same area, meant that a lode or vein might be secured by a party other than the owner of the placer location within which it is discovered—providing his discovery was made without forcible trespass and disposition—it may be that a court of equity is competent to provide by its decree that the discoverer of the lode, within the placer limits, shall be secured in the temporary possession of so much of the ground as will enable him to successfully work his lode, protecting at the same time the rights of the placer locator. But such equit-

able adjustment of coexisting rights cannot be secured in a simple adverse action and it would be, therefore, beyond the limits of proper inquiry in this case to determine the rights which may exist, if in the end the placer location be sustained and a discovery of the lodes without forcible trespass and dispossession established.

But for the present, for the reasons above given, we think the judgment of the Supreme Court of Colorado was right, and it is

*Affirmed.*

The CHIEF JUSTICE and Mr. Justice WHITE dissent.

True copy.

Test:

*Clerk Supreme Court, U. S.*